Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

DONALD H. CARLSON, WARREN HART, GERARD HASKINS, STEPHEN R. LIBBY, EARL WEESE, and LYLA C. WEESE, INDIVIDUALLY and as CLASS REPRESENTATIVES ON BEHALF OF ALL PERSONS SIMILARLY SITUATED,

Petitioners,

v.

STATE OF ALASKA, COMMERCIAL FISHERIES ENTRY COMMISSION,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Alaska

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in imposing on non-resident commercial fishermen license and permit entry fees that are three times greater than those imposed on resident commercial fishermen, Alaska discriminates against interstate commerce in violation of the Commerce Clause?

2. Whether, in imposing on non-resident commercial fishermen license and permit entry fees that are three times greater than those imposed on resident commercial fishermen, Alaska violates the Privileges and Immunities Clause, particularly where the sole justification for the discrimination is that residents "contribute" oil royalty revenues to the State's fishery management efforts.

PARTIES TO THE PROCEEDINGS

Other than the unnamed class members, all of whom are individual commercial fishermen who are not residents of Alaska, there are no petitioners or respondents in addition to those named in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Donald H. Carlson, Warren Hart, Gerard Haskins, Stephen R. Libby, Earl Weese, and Lyla C. Weese, individually and as class representatives on behalf of all persons similarly situated ("Petitioners"), respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Alaska in this case.

OPINIONS BELOW

The opinions of the Supreme Court of Alaska are reported at 798 P.2d 1269 (Alaska 1990) ("*Carlson I*"), reprinted at pages 33a-57a of the appendix to this petition, and at 919 P.2d 1337 (Alaska 1996) ("*Carlson II*"), reprinted at pages 1a-28a of the appendix to this petition. The final orders of the Superior Court of the State of Alaska are unreported. The Superior Court's "Decision and Final Order on Reconsideration of the Court's August 12, 1993 Order and Final Decision Granting the State's Motion for Summary Judgment" (July 25, 1994) may be found at pages 29a to 32a of the appendix to this petition. The Superior Court's "Final Order" (Feb. 21, 1989) may be found at page 58a of the appendix to this petition.

JURISDICTION

The Supreme Court of Alaska entered its judgment on June 21, 1996. On September 10, 1996, on application of petitioners, Justice O'Connor extended the time in which to file the petition for writ of certiorari to and including October 21, 1996. On October 10, 1996, Justice O'Connor further extended the time in which to file the petition for writ of certiorari to and including October 31, 1996. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).[1]

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[1] The decision of the Alaska Supreme Court is final. Just as cases are final in which the amount of damages remains to be determined, so here the judgment is final even though an issue remains whether a partial refund should be granted. Further proceedings on that issue will not moot either the Commerce Clause or the Privileges and Immunities Clause issues. *See Cox Broadcasting Corp. v. Cohen*, 420 U.S. 469, 478-80 (1975).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are located in the appendix to this petition at App. 59a-63a.

STATEMENT

This case presents questions as to whether, consistent with the Commerce Clause and the Privileges and Immunities Clause of the United States Constitution, Alaska may discriminate against non-resident commercial fishermen by charging them three times the licensing and permitting fees it charges resident commercial fishermen for access to the State's fisheries. Alaska concedes that the higher fees imposed on non-residents are not based on any higher costs involved in fishing by non-residents.

Petitioners urge that Alaska's license and permit fee differential violates both the Commerce Clause and the Privileges and Immunities Clause. The constitutional issues presented by this case are of particular significance in light of the large number of states that, like Alaska, discriminate against non-resident commercial fishermen in imposing license and permit fees, and the increasing importance of the commercial fishing industry to the nation at large.

1. The Alaskan Fishing Industry

Fishing is a major industry in Alaska. After oil, the fishing industry "is the second largest contributor to the State's economy, generating over $77 million in taxes and fees to the State in 1994."[2] The fishing industry also is a significant employer, employing over 35,000 workers and operating more than 550 processing facilities within the State.[3]

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[2] Commercial Fisheries Entry Commission, 1994 Annual Rpt. at 1 ("Annual Report").

[3] *Id.*

Alaska's fishing industry figures prominently in the country and the world. In 1995, commercial fishermen at Alaskan ports landed 5.4 billion pounds of fish, valued at $1.4 billion.[4] That same year, total commercial landings at all United States ports were 9.9 billion pounds of fish with a value of $3.8 billion.[5] Thus, in 1995, commercial landings at Alaskan ports represented more than half of the total national catch of fish (in pounds) and approximately 40% of the value of fish caught and landed at U.S. ports. This is not surprising, given that Alaska has "five of the Nation's top ten fishing ports" in terms of commercial landings.[6] The State's commercial landings — quantities of fish bought and sold — are so large that, "[i]f Alaska were a nation, it would rank among the top ten worldwide seafood producers . . . ahead of nations such as Norway, Canada, and Iceland."[7]

Given the sheer size of the fish pool in Alaskan waters, it is not surprising that large numbers of non-residents annually go to Alaska to participate in its many commercial fisheries. In 1992, the last year for which data appear in the record, Alaska issued 32,327 permits, of which 25,837 were issued to residents; thus, 20 per cent of all permits were held by non-residents.[8] From 1984 to 1992, Alaska issued approximately 30,000 permits per

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[4] National Oceanic and Atmospheric Administration, *Fisheries of the United States*, at vi (1995) ("*Fisheries*"). The next highest state in terms of commercial landings in 1995 was Louisiana with 1.1 billion pounds. *Id.*

[5] *Id.* at iv.

[6] Annual Report at 1.

[7] *Id.*

[8] *See Carlson v. State of Alaska*, Case No. 3AN-84-5790, "State's Supplemental Memorandum In Support Of Its Motion For Summary Judgment On Remand: Additional Budgetary Items Relevant To The Privileges And Immunities Clause And Commerce Clause Challenges," at 20 (Alaska Superior Ct., Nov. 1, 1993).

year; for that six year period, approximately 16 per cent of permits were issued to non-residents.[9]

In recognition of the important interstate character of the fishing industry, federal statutes and regulations operative in the Alaska waters effectuate a comprehensive federal regulatory scheme. As the Magnuson Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, 90 Stat. 331 (codified as amended at 16 U.S.C. §§ 1801-1882) ("Magnuson Act") declared, "[c]ommercial . . . fishing constitutes a major source of employment and contributes significantly to the economy of the Nation." Pub. L. No. 94-265, § 2(a)(3), 90 Stat. 332. The Magnuson Act and its enabling regulations establish a far-reaching program of fisheries management and conservation. This is particularly true with respect to Alaskan waters. Indeed, one reason for the enactment of the Magnuson Act was to develop fisheries for Alaska's bottom fish, because it "is necessary to assure that our citizens benefit from the employment, food supply, and revenue which could be generated thereby." *Id.* at § 2(a)(7), 90 Stat. 332.[10]

Despite the federal regulations, Alaska retains the power to tax fishing in its territorial waters and to impose licensing and permitting fees. *See Alaska v. Arctic Maid*, 366 U.S. 199, 203 (1961); *Toomer v. Witsell*, 334 U.S. 385, 393 (1948); Alaska Stat. §§ 16.43.100(a)(18), 16.43.160.[11]

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[9] *Id.*

[10] The national interest also is reflected in international treaties that govern the amount of catch and ownership of fish fishing in Alaska. For example, the U.S. Canadian Pacific Salmon Treaty (1985) assigns ownership of fish to the country in which they spawn. *See Treaty Concerning Pacific Salmon*, Jan. 28, 1985, U.S. - Canada, TIAS 11091.

[11] Alaska controls the waters within three miles of its shore; the federal government has authority over the three to two-hundred mile range. *See* 43 U.S.C. § 1301.

2. The Alaskan License and Permit Tax Schemes

All persons seeking to fish in Alaska for commercial purposes are required to purchase a commercial fishing license. App. 59a. The State charges residents $30 for this license. *Id.* Non-residents, in contrast, must pay $90 for the identical license. *Id.* In addition, fishermen seeking to fish in certain Alaska waters — the most intensively used commercial fisheries — are required to purchase limited entry permits.[12] App. 60a-63a. Like the licenses, the cost of limited entry permits depends on whether the fisherman is a resident or a non-resident. For non-residents, the annual renewal fee for these limited entry permits is three times higher than the fee residents must pay. App. 59a-61a. Translated into dollars, residents annually pay between $50 and $250 for the limited entry permits.[13] For non-residents, the annual fee for the identical limited entry permit ranges from $150.00 to $750.00. App. 61a. Non-residents therefore may be required to pay as much as $500 more than residents for precisely the same permit. Alaska has essentially admitted that the overall purpose of the permit system is to keep non-residents out of Alaska's fisheries: "Absent limited entry, many of the State's high-valued fisheries would experience large increases in effort by new entrants from several states. Such increases in effort would raise management costs and would likely threaten the resource and the livelihood of many Alaskans in coastal communities where commercial fishing is the cornerstone of the economy."[14]

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[12] The limited entry program is designed to maintain the "stability" of Alaska's fisheries resources by "regulating and controlling entry" into its commercial fisheries. *See* Title 16, Article 43, Alaska Statutes. Respondent Commercial Fisheries Entry Commission ("CFEC") is the regulatory body created to manage that program. Alaska Stat. § 16.43.020.

[13] The cost of permits varies with the profitability of particular fisheries. *See* App. 59a-60a.

[14] Annual Report at 3.

The effect of the higher costs imposed on non-residents can be significant. For example, a resident fisherman, fishing in the Bristol Bay herring spawn on kelp fishery, would have an annual permit cost of $50. App. 3a n.4. In contrast, a non-resident seeking to fish in that same fishery would have an annual permit cost of $150. App. 3a n.4. From 1983 to 1993, the average gross earnings per permit for the Bristol Bay herring spawn on kelp fishery ranged from $847 to $1613. App. 3a n.4. The permit fee for a single non-resident herring fisherman thus represented, for the Bristol Bay herring spawn on kelp fishery from 1983 to 1993, approximately 10% to 20% of gross earnings.

Alaska's policy of discriminating against non-residents for commercial fishing license purposes dates back to its days as a Territory. In 1951, the Ninth Circuit held unconstitutional, under the Commerce Clause, an Alaskan territorial statute imposing a $50 commercial license fee on non-residents where residents were required to pay a fee of only five dollars. *Anderson v. Mullaney*, 191 F.2d 123, 125 (9th Cir. 1951), *aff'd*, 342 U.S. 415, 417-18 (1952). The Ninth Circuit recognized that "the necessary effect of the discrimination was to discourage, hamper and burden this interstate movement of fishermen." 191 F.2d at 128. The Ninth Circuit declined to reach the Privileges and Immunities Clause issue because of its holding of unconstitutionality under the Commerce Clause. This Court held that territories, as well as states, are subject to constitutional limitations, and also held that Alaska's discriminatory fishing license fees violated the Privileges and Immunities Clause. *Mullaney v. Anderson*, 342 U.S. 415, 416, 419-20 (1952).

Thereafter, at the time of statehood, and despite this Court's decision in *Mullaney v. Anderson*, the Alaska legislature enacted a fishing gear licensing requirement under which non-residents were again charged discriminatory fees — three times the fees paid by residents for the same gear types. App. 34a. Although the contours of the commercial fishing licensing system were changed again in 1973 and in 1977, with gear licenses eventually eliminated and limited entry permits created, Alaska continued to discriminate against non-residents by imposing higher fees for

licenses and permits. App. 35a-36a. The present case is apparently the first challenge to these discriminatory fees since *Mullaney v. Anderson*.

3. The Proceedings Below

Petitioners are a class of non-resident commercial fisherman who have been required to pay three times as much as Alaska residents to obtain necessary fishing licenses and permits. App. 1a-2a, 33a. Petitioner Carlson is a non-resident salmon gillnetter in the Peninsula-Aleutians drift gillnet fishery. Petitioner Hart is a non-resident salmon gillnetter in the Bristol Bay drift gillnet fishery. Petitioner Haskins is a non-resident fisher who has held commercial licenses for salmon in the Kodiak purse seine fishery, the Prince William Sound purse seine fishery, the statewide herring purse seine fisheries and the statewide herring spawn fisheries. Petitioner Libby is a non-resident Bristol Bay salmon drift gillnetter. Both petitioner Earl Weese and petitioner Lyla Weese are non-resident salmon setnetters in the Bristol Bay salmon setnet fishery. *See*, *Carlson v. State of Alaska*, Case No. S-6590 Appellants' Excerpt of Record at 2-3 (Alaska Supreme Ct., filed Jan. 3, 1995) (hereafter Excerpt of Record).

Petitioners filed suit in Alaska Superior Court, challenging discriminatory Alaska statutes and regulations, specifically, Alaska Stat. §§ 16.05.480 and 16.43.160(b), and Alaska Admin. Code tit. 20, § 05.240. App. 33a. Petitioners' complaint requested a declaration that, *inter alia*, the differential fees violated the Commerce Clause and the Privileges and Immunities Clause of the United States Constitution. App. 33a-34a. Petitioners sought to permanently enjoin the state from exacting these higher license and permit fees from non-residents, and they requested a refund of the fees paid by non-residents that exceeded those paid by residents.

Carlson I. The case first came before the Alaska Superior Court on the merits on Commerce Clause and Privileges and Immunities Clause questions in February 1987. Alaska conceded that no benefits are conferred through its licenses and permits on non-resident commercial fishermen that resident commercial

fishermen do not also enjoy. Excerpt of Record at 58. In addition, Alaska conceded that non-resident commercial fishermen do not impose greater costs on the state than resident commercial fishermen. *Id.* Alaska also conceded that non-resident commercial fishermen do not create any regulatory problems "capable of solution only by the discriminatory taxes at issue here." *Id.* But Alaska urged that the discrimination was justified, in order to ensure that non-residents contributed to the general costs of government devoted to fisheries management. App. 37a.

On crossmotions for summary judgment, the Superior Court held that commercial fishing is within the reach of the Commerce Clause, and that, on its face, the fee differential "discriminated against interstate commerce." App. 40a. Nonetheless, the court concluded that the "legitimate local purpose of ensuring that non-residents pay their fair share of fisheries management costs justified the discrimination, assuming the fee differential bore a substantial relationship to that purpose." *Id.* (internal quotations omitted).

In addition, relying on this Court's decision in *Toomer v. Witsell*, 334 U.S. 385 (1948), the Superior Court held that commercial fishing falls within the Privileges and Immunities Clause. App. 40a. Nonetheless, the court concluded that the State had demonstrated a "permissible" reason for the discrimination — "to have the non-resident[s] pay a part of their fair share of the costs of enforcement, management and conservation of the fisheries of the state, which costs are largely borne by the residents through general fund expenditures." *Id.*

On appeal, the Alaska Supreme Court stated that the analysis under the Commerce Clause, "assuming it is implicated," is similar to the analysis under the Privileges and Immunities Clause. App. 47a. The court noted, however, that early cases from this Court had "suggested that the Commerce Clause does not come to play until the fish are actually harvested . . . ," although "[d]ictum in more recent cases suggests the contrary." *Id.* at n.4. It appears that the Alaska Supreme Court did not

reach a conclusion about the Commerce Clause challenge at that time.

As to the Privileges and Immunities Clause, the Alaska Supreme Court agreed with the Superior Court that "[c]ommercial fishing is a sufficiently important activity to come within the purview of the Privileges and Immunities Clause, and license fees which discriminate against non-residents are prima facie a violation of it." App. 43a. However, the Alaska Supreme Court remanded the case for consideration of "whether all fees and taxes which must be paid to the state by a nonresident to enjoy the state-provided benefit are substantially equal to those which must be paid by similarly situated residents when the residents' *pro rata* shares of state revenues to which nonresidents make no contribution are taken into account." App. 50a. To the court, Alaska's unique revenues from petroleum production are the functional equivalent of taxes "which only residents pay." *Id.* Put another way, "where residents pay proportionately more by way of foregone benefits than nonresidents for fisheries management, nonresidents may be charged higher fees to make up the difference." App. 50a-51a. On remand, the Superior Court was to determine "whether the higher fees charged nonresidents are excessive for this purpose." App. 51a.

Carlson II. On remand, the parties each proposed a different method by which to compare the fees paid by non-residents with the expenditures of state revenues to which non-residents make no contribution. App. 4a. Petitioners proposed a formula under which the contribution made by each resident to the cost of maintaining the commercial fisheries is compared with the fee differential. *Id.* The Superior Court rejected that formula, instead adopting Alaska's approach, which "in effect compares the total contributions made to the cost of commercial fisheries by residents to the total fees paid by non-residents." App. 4a-5a. Applying that analysis, the court concluded that the discriminatory fees did not violate the Privileges and Immunities Clause because "residents paid by way of taxes or the economic equivalent of taxes, *i.e.*, benefits foregone, substantially more than non-resident

fishers pay toward the benefits received. . . ." App. 31a; *see* App. 5a.

On appeal, the Alaska Supreme Court rejected the claim that higher fees imposed on non-residents violate the Commerce Clause. According to the court, it is only when harvested fish cross state lines that they become articles of commerce. Because, the court stated, "the fee differentials at issue in this case are not predicated upon the movement of articles of commerce across state lines, but rather upon the residency status of those applying for permits," App. 7a-8a, the decisions of the United States Supreme Court "do[ ] not require that the fee differential challenged herein be evaluated under the Commerce Clause." App. 7a.

As to the Privileges and Immunities Clause, the Alaska Supreme Court essentially held that the compensatory tax rules applicable under the Commerce Clause did not apply. App. 10a-12a. The court held that the Alaska fee differential "merely balances out any conservation expenditures from taxes which only residents pay." App. 11a (citing *Toomer*, 334 U.S. at 399). The Alaska Supreme Court refused to apply this Court's decision in *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Oregon*, 114 S.Ct. 1345 (1994), in which this Court held that the Commerce Clause does not permit states to consider residents' contributions to general tax revenues as compensating for higher fees imposed on out-of-state competitors. App. 10a-11a. Although the Alaska court acknowledged that "the reasoning of Privileges and Immunities Clause cases has been used in Commerce Clause cases," App. 10a, it did not consider it appropriate to apply the Commerce Clause reasoning of *Oregon Waste Systems* to the Privileges and Immunities Clause issue, stating that "[t]hese are different inquiries for which the analysis is not interchangeable." *Id.* The Alaska Supreme Court remanded the case to the Superior Court for application of the proper formula under the Privileges and Immunities Clause. Under the formula approved by the court, a complete refund of the fee differential is impossible. The lower court, however, is

to determine whether a partial refund of fees paid by non-residents should be awarded. App. 14a-16a.[15]

Justice Rabinowitz dissented. App. 22a-28a. First, he would have applied this Court's decision in *Oregon Waste Systems* and the compensatory tax doctrine to the Privileges and Immunities analysis. App. 22a. While acknowledging this Court's dicta in *Toomer v. Witsell* that a state could "charge non-residents a differential which would merely compensate the State . . . for any conservation expenditures from taxes which only residents pay," he noted that this Court recently has "explicitly rejected this type of justification for state discrimination in the Commerce Clause context" in *Oregon Waste Systems*. App. 25a. Justice Rabinowitz stated that he "cannot . . . join in the majority's summary rejection of the United State's Supreme Court decision in *Oregon Waste Systems*." App. 24a. Indeed, to the dissent, "the mutually reinforcing relationship between the Privileges and Immunities Clause . . . and the Commerce Clause," and the Supreme Court's use of "Commerce Clause precedent in deciding claims based solely on the Privileges and Immunities Clause," App. 22a (citing *Hicklin v. Orbeck*, 437 U.S. 518, 531-532 (1978)), made it appropriate to apply the compensatory tax doctrine to the Privileges and Immunities Clause. According to Justice Rabinowitz, while the two clauses are not completely interchangeable, "once it has been determined that a discriminatory policy falls within the purview of one or both of these clauses . . . , I am not persuaded that the methodology of the two should diverge in any significant respect." App. 22a-23a.

Second, applying *Oregon Waste Systems*, Justice Rabinowitz would have held the discriminatory fee structure unconstitutional. He found "the justification offered by Oregon for discriminating against out-of-state interests in *Oregon Waste Systems* . . . very similar, if not identical, to the justification advanced by the State

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[15] While the State may argue that certain procedural requirements for a refund have not been met, there is no issue concerning the propriety of declaratory and injunctive relief.

in the case at bar." App. 24a. In each case, the respective states were making a "fair share" argument and in each case the state's share or contribution was augmented by general state tax revenues in Oregon, or their analytical equivalent (oil royalty revenues) in Alaska, "in order to justify the tax or fee discrepancies." App. 25a.

The Petition for Writ of Certiorari followed.

REASONS FOR GRANTING THE WRIT

This case presents important and far-reaching questions concerning the application of the Commerce Clause and the Privileges and Immunities Clause to commercial fishing operations.

Alaska requires non-resident commercial fishermen to purchase licenses and permits at a cost three times greater than those purchased by residents. Despite this facial discrimination against non-resident commercial interests, the Alaska court held that the Commerce Clause is not even implicated, much less violated. As to the Privileges & Immunities Clause, the court below held that the Clause was applicable but that the fees paid by non-residents were valid to the extent that they compensated for "contribution[s] made by residents" to general revenue, App. 11a, a theory this Court routinely rejects in looking at discriminatory taxes under the Commerce Clause.

The decision below, which constitutes an unmistakable effort to protect local industry from out-of-state competition, has nationwide significance. At least nineteen states similarly discriminate against non-resident commercial fishermen. *See infra* at 25 n.20. If not reversed, the decision below will encourage other states both to disregard this Court's well-established Commerce Clause jurisprudence and to continue to apply antiquated rules under the Privileges and Immunities Clause, which this Court's decisions have long since discredited.

I. THE DECISION BELOW CONFLICTS WITH COMMERCE CLAUSE DECISIONS OF THIS COURT

The decision of the Alaska Supreme Court clearly holds that this Court's decisions "do[ ] not require that the fee differential challenged herein be evaluated under the Commerce Clause." App. 7a. While the decision below is not a model of clarity, the reasons for the court's conclusion appear to be twofold. First, according to the Alaska court, discrimination "based on the residency status of those applying for permits" is not evaluated under the Commerce Clause. App. 8a. Second, the "fee differentials . . . are not predicated upon the movement of articles of commerce across state lines," as the fish are caught prior to entering the stream of interstate commerce. App. 7a-8a. Each holding directly conflicts with longstanding decisions of this Court.

A. The Decision Below Conflicts With This Court's Decisions Holding That The Commerce Clause Precludes States From Discriminating Based on Residency

In holding that discrimination based on residency is not cognizable under the Commerce Clause, the Alaska Supreme Court, relying on plainly inapplicable decisions of this Court, declared that this Court has instead "consistently analyzed statutes which purportedly classify on the basis of residency under the Privileges and Immunities or the Equal Protection Clauses." App. 8a.[16] This holding reflects a serious and fundamental

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[16] In support of its claim, the Alaska court cited five decisions of this Court. App. 8a, n.10. None even suggests that discrimination against commercial interests based on residency is not cognizable under the Commerce Clause. The Commerce Clause holding of *Toomer v. Witsell*, which has been wholly discredited, *see infra* at 17-19, did not relate to the higher license fees imposed on nonresidents, but rather to a nondiscriminatory tax imposed on the taking of shrimp. In *United Building & Construction Trades Council v. Mayor & Council of Camden*, 465 U.S. 208 (1984), the municipal resident hiring preference at issue there was not subject to a Commerce Clause challenge because

misconception of this Court's Commerce Clause jurisprudence and conflicts with decisions of this Court going back more than 100 years. The decision below is not supported by any decisions of this Court.

Nearly 170 years ago, this Court rejected the notion that the Commerce Clause does not reach discrimination based on residency: "The distinction between a tax on the thing imported, and on the person of the importer, can have no influence on this part of the subject. It is too obvious for controversy, that they interfere equally with the power to regulate commerce." *Brown v. Maryland*, 25 U.S. (12 Wheat) 419, 448 (1827). Since that time, this Court consistently has rejected that theory. Thus, in *Walling v. Michigan*, 116 U.S. 446 (1884), this Court held that a tax imposed on out-of-state residents selling liquor in the state, which was not imposed on in-state residents, violated the Commerce Clause. To the Court, the Commerce Clause prohibits a state from imposing a tax "in a matter of commerce between the States . . . so specialized as to operate as a discriminative burden . . . against the citizens of another State." *Id.* at 460.

More recently, in *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977), this Court relied on the Commerce Clause to strike down a North Carolina statute that, while neutral on its face, imposed costs on non-resident apple sellers that were not imposed on resident apple sellers. Similarly, in *Armco v. Hardesty*, 467 U.S. 638 (1984), this Court struck

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Camden, in limiting employment to residents, was operating as a market participant, and thus was shielded from Commerce Clause scrutiny. In *Hicklin v. Orbeck*, 437 U.S. 518, 531 (1978), as the Court was careful to point out, the parties had not raised any Commerce Clause challenge to the Alaska law giving a preference to state residents. *Sosna v. Iowa*, 419 U.S. 393 (1975), concerned residency limitations on a state court's divorce jurisdiction; there were no commercial interests advanced to implicate the Commerce Clause. Finally, the Alaska Court's reliance on *Baldwin v. Fish & Game Commission of Montana*, 436 U.S. 371 (1978), is wholly misplaced. That case involved recreational, not commercial, hunting, and no Commerce Clause challenge was brought.

down, as a violation of the Commerce Clause, a West Virginia statute subjecting out-of-state manufacturers to a gross receipts tax from which in-state manufacturers were exempt. In *New Energy Co. v. Limbach*, 486 U.S. 269 (1980), this Court invalidated a reciprocal tax credit because it, "in effect, tax[es] a product made by [Indiana] manufacturers at a rate higher than the same product made by Ohio manufacturers." *Id.* at 276.

This rule applies with equal force where the discrimination concerns natural resources. The Commerce Clause is implicated whenever a state seeks "to prefer its own citizens in the utilization of natural resources found within its borders, but destined for interstate commerce." *Hicklin v. Orbeck*, 437 U.S. 518, 533 (1978). It is by now well established that the Commerce Clause forbids a state from "accord[ing] its own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders." *Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978) (citing *West v. Kansas Natural Gas Company*, 221 U.S. 229 (1911)).

Thus, in *Philadelphia v. New Jersey*, this Court held that New Jersey violated the Commerce Clause when it banned the importation of most waste in order to preserve landfill space — a natural resource. 437 U.S. at 628-29. Likewise, in *Pennsylvania v. West Virginia*, 262 U.S. 553, 600 (1923), this Court held that West Virginia's efforts to preserve natural gas produced in the state for its own citizens violated the Commerce Clause. West Virginia had tried to preserve natural gas for its citizens by prohibiting distributors from exporting natural gas out of the state where producers would be unable to adequately serve users in the state. *Id.* at 593. More recently, in *Oregon Waste Systems*, this Court relied on its earlier holding in *Philadelphia v. New Jersey* to make clear that states cannot prefer their own citizens in granting "a right of access" to natural resources within the state. *Oregon Waste Systems*, 114 S.Ct. at 1354. As a result, this Court held that Oregon's imposition of a surcharge on the in-state disposal of waste generated out-of-state violated the Commerce Clause. *Id.* at 1354-55.

The decision below also directly conflicts with the decision of the Court of Appeals for the Ninth Circuit in *Anderson v. Mullaney*, affirmed by this Court. There, the Ninth Circuit held that Alaska territorial statutes, which imposed a $50 fee on non-resident commercial fishermen while imposing only a $5 fee on resident commercial fishermen, violated the Commerce Clause. 191 F.2d at 125. In affirming the Ninth Circuit's decision, *see supra* at 6, this Court did not disapprove the Ninth Circuit's Commerce Clause holding.

In each of these cases, out-of-state interests were subjected to burdens that were not imposed on their in-state competitors. In each of these cases, those costs were found to violate the Commerce Clause. It does not matter, as the decision below seems to suggest (*see* App. 7a-8a), whether the out-of-state commercial interest is a corporation, *see, e.g., Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963), or an out-of-state individual, *see, e.g., Freeman v. Hewit*, 329 U.S. 249, 255 (1946). In each instance the question to be determined is whether the state statute discriminates against interstate commerce. Thus, as this Court held in the use tax context, "[t]he conclusion is inescapable: equal treatment for in-state and out-of-state taxpayers similarly situated" is required. *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. at 70.

B. The Decision Below Conflicts With Decisions of This Court Holding That The Protections of The Commerce Clause Apply Even Before Articles Enter The Stream of Commerce

The decision below also conflicts with this Court's holdings that the Commerce Clause forbids discrimination against interstate commerce even before the articles have entered the stream of commerce. Despite Alaska's facial discrimination against non-resident commercial fishermen, the Alaska Supreme Court apparently concluded, in both *Carlson I* and *Carlson II*, that the protections of the Commerce Clause did not apply because "the fee differentials at issue in this case are not predicated upon the movement of articles of commerce across state lines . . . ." App.

7a-8a. In reaching this conclusion the court below relied on *Toomer v. Witsell*'s holding that the taking of shrimp in South Carolina could be taxed because the "taxable event, the taking of shrimp, occurs before the shrimp can be said to have entered the flow of interstate commerce." 334 U.S. 385, 394-95 (1948). The court's reliance on *Toomer v. Witsell* in the present context is misplaced; in any event, that aspect of *Toomer v. Witsell* has long been discredited.

The Commerce Clause holding of *Toomer v. Witsell* was directed solely to the question of whether the state could impose a nondiscriminatory tax on the taking of shrimp, despite the fact that the shrimp industry was interstate in character. At the time *Toomer v. Witsell* was decided, this Court still sometimes held that "direct" taxes on interstate commerce were invalid, but that the states could tax certain local activities that occurred before interstate commerce commenced. *See, e.g., Memphis Natural Gas Co. v. Stone*, 335 U.S. 80, 87-88 (1948); *Michigan-Wisconsin Pipeline Co. v. Calvert*, 347 U.S. 157, 166 (1954). This distinction allowed states to circumvent the prohibition on state taxation of the "privilege" of engaging in interstate commerce. *See, e.g., Aero Mayflower Transit Co. v. Board of R.R. Comm'rs*, 332 U.S. 495, 502 (1947) (tax on vehicles engaged in interstate commerce constitutional where tax applies "exclusively to operations wholly within the State . . . although those operations are interstate in character").

The last vestiges of the rule that the states could not tax the "privilege" of engaging in interstate commerce were removed in *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977), and the line drawn between taxation on local activities taking place before interstate commerce commences and taxation on interstate commerce no longer has any validity. *See, e.g., Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 617 (1981) ("a state severance tax is not immunized from Commerce Clause scrutiny by a claim that the tax is imposed on goods prior to their entry into the stream of interstate commerce").

Like *Toomer* itself, the case on which it relied, *Heisler v. Thomas Colliery Co.*, 260 U.S 245 (1922), *see* 334 U.S. at 395 n.22, also has been discredited. This Court has expressly disapproved "*Heisler* and its progeny" for the notion that the Commerce Clause only applies once the article of commerce has "[entered] the flow of interstate commerce." *Commonwealth Edison Co.*, 453 U.S. at 617.[17]

Thus, this Court has unequivocally rejected the formalistic and anachronistic distinction between "local activities," to which the Commerce Clause would not apply, and goods that have "ent[ered] the stream of commerce," to which the Commerce Clause would apply. *Commonwealth Edison Co.*, 453 U.S. at 617; *see, e.g., C&A Carbone Inc. v. Town of Clarkstown*, 114 S.Ct. 1677, 1681 (1994) (although garbage is processed before it entered the stream of interstate commerce, the economic effects are "interstate in reach"); *Washington State Apple Advertising*

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[17] Even at the time *Toomer* was decided, this Court did not sanction discriminatory taxation of "local" activities. In *Toomer* itself the "local" activity holding did not extend to the discriminatory license fee (which was invalidated under the Privileges and Immunities Clause), but only to a tax imposed directly on the shrimp caught. In fact, three Justices concurred separately in *Toomer* to emphasize their view that the discriminatory license fee was invalid under the Commerce Clause. Justices Frankfurter and Jackson, although recognizing a state's power over resources destined solely for in-state markets stated that "[i]t is a wholly different thing for the State to provide that only its citizens shall be engaged in commerce among the States, even though based on a locally available food supply. . . . When a State regulates the sending of products across State lines we have commerce among the States as to which State intervention is subordinate to the Commerce Clause." 334 U.S. at 409 (Frankfurter, J., concurring). Justice Rutledge, in a separate concurrence, stated with respect to a state regulation aimed directly at interstate commerce, "it was exactly that sort of state regulation the commerce clause was designed to strike down." 334 U.S. at 410. As discussed earlier, *see supra* at 17-19, this Court has since *Toomer* repeatedly made clear that discriminatory taxes on local activities are invalid under the Commerce Clause.

Comm'n, 432 U.S. at 350; *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 141-42 (1970); *Nippert v. Richmond*, 327 U.S. 416, 423-24 (1946). Plainly, states cannot discriminate against interstate commerce based on the claim that the discrimination applies only to activities "local" in character. Any other rule would eviscerate the Commerce Clause because "[a]ll interstate commerce takes place within the confines of the states and necessarily involves 'inci-dents' occurring within each state through which it passes. . . ." *Id.* at 421. The discriminatory tax scheme at issue here plainly violates the commerce clause, and the decision below warrants review by this court.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT HOLDING THAT CONTRIBUTIONS MADE BY RESIDENTS TO GENERAL TAX REVENUES CANNOT JUSTIFY DISCRIMINATORY TAXES

This case also presents important questions under the Privileges and Immunities Clause. This Court long ago recognized that "the object of the [Privileges and Immunities Clause is] to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those states are concerned." *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869). Consistent with that principle, this Court has held that the Privileges and Immunities Clause protects the right to engage in a common trade or profession within other states.

In fact, over 100 years ago, this Court held that imposing a higher license fee on non-resident traders than those imposed on resident traders violates the guarantee of the Privileges and Immunities Clause against "being subjected to any higher tax or excise than that exacted by law of . . . permanent residents." *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 430 (1871). In what this Court has referred to as "the first, and long the leading, explication of the Clause," Justice Washington, sitting as Circuit Justice, held that "the fundamental privileges and immunities protected by the Clause" include "'an exemption from higher taxes or impositions than are paid by the other citizens of the

state.'" *Austin v. New Hampshire*, 420 U.S. 656, 661 (1975) (quoting *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1825) (No. 3,230)).

This Court has made clear that commercial fishing is a protected profession. In *Toomer v. Witsell*, this Court held that the higher shrimp license fee imposed on non-residents violated the Privileges and Immunities Clause. As the Court there declared, "it was long ago decided that one of the privileges which the Clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State." 334 U.S. at 396. Thereafter, in *Mullaney v. Anderson*, this Court declared that, pursuant to its decision in *Toomer v. Witsell*, the Privileges and Immunities Clause "would bar any state from imposing" a license fee that discriminated based on residency. 342 U.S. at 417-18. Thus, there can be no question but that nonresident commercial fishermen in Alaska are protected by the Privileges and Immunities Clause, and the decision of the Alaska Supreme Court directly conflicts with this Court's decision in *Mullaney v. Anderson*.

Under the Privileges and Immunities Clause, as under the Commerce Clause, different treatment of non-residents is justified only in extraordinary circumstances.[18] Under the Commerce Clause, discrimination may be justified if there is a legitimate state interest that cannot be achieved by alternative nondiscriminatory means. For example, in *Maine v. Taylor*, 477 U.S. 131 (1986), this Court rejected a Commerce Clause challenge to Maine's ban on the importation of live bait. The ban was held to serve the "legitimate local purpose" of protecting native fisheries from parasitic infection and there was, at that time, no "sampling and inspection procedures" in existence for baitfish which would obviate the need for the total ban. *Id.* at 147-48. Similarly,

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[18] Given the common origin of the two clauses, this is hardly surprising. *See Baldwin*, 436 U.S. at 379 ("In the Articles of Confederation, where both Clauses have their source, the two concepts were together in the fourth Article").

under the Privileges and Immunities Clause, discrimination can be justified if the nonresident is "somehow . . . shown to 'constitute a peculiar source of evil at which the statute is aimed.'" *United Bldg. & Constr. Trades v. Mayor & Council of Camden*, 465 U.S. 208, 222 (1984) (quoting *Toomer*, 334 U.S. at 398).

No such claim is made in this case, nor could it be, as the State of Alaska has expressly conceded that non-resident commercial fishermen do *not* create "regulatory problems capable of solution only by the discriminatory taxes at issue here." Excerpt of Record at 58. Instead, the Alaska court held that the discrimination is justified because "residents pay proportionately more in foregone benefits than nonresidents for fisheries management." App. 10a. The court below looked to benefits derived from oil royalty revenues paid the State by oil companies and "foregone" by state residents.

To be sure, some earlier Privileges and Immunities Clause cases suggested that such a compensatory tax justification might be acceptable. In *Toomer v. Witsell*, for example, this Court noted in dicta that "[t]he State is not without power . . . to charge non-residents a differential which would merely compensate the State . . . for any conservation expenditures from taxes which only residents pay." 334 U.S. at 398-99. But no decision of this Court has ever upheld such discrimination, much less a discrimination based on a theory of foregone revenues, and a comparable justification has been discredited under the Commerce Clause.

Before the late 1970s, in Commerce Clause cases this Court sometimes appeared to agree that "rough justice" may have been all that was required under the Commerce Clause. One example of that approach was reflected in *Caskey Baking Co. v. Virginia*, 313 U.S. 117 (1941). At issue there was an annual fee imposed by Virginia on each vehicle used to distribute goods where the seller did not have an office in the Commonwealth. Exempted from this requirement were manufacturers taxable on capital stock or distributors of manufactured goods paying a license tax on purchases. *Id.* at 118. In upholding the tax, this Court noted that

the challenged tax "is but one portion of a comprehensive scheme of taxation" under which manufacturers, wholesale merchants, retail merchants and peddlers at retail are all subject to other taxes. *Id.* at 120.

That approach has now been explicitly rejected by this Court in the Commerce Clause context. In *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984), this Court struck down under the Commerce Clause a West Virginia gross receipts tax on wholesalers from which local manufacturers were exempt. The Court rejected the argument that the wholesale tax exemption did not discriminate against out-of-state taxpayers because it served as compensation for the imposition of a heavy manufacturing tax on in-state taxpayers. The Court held that "manufacturing and wholesaling are not 'substantially equivalent events' such that the heavy tax on in-state manufacturers can be said to compensate for the admittedly lighter burden placed on wholesalers from out of State." 467 U.S. at 643 (citation omitted). This Court specifically discredited *Caskey Baking*, finding that it involved "a nondiscriminatory tax on a particular kind of business," and another tax on a different kind of business. *Id.* at 643 n.7.

More recently, in *Oregon Waste Systems, Inc. v. Department of Environmental Quality*, this Court noted its "recent reluctance to recognize new categories of compensatory taxes," and expressly rejected the notion that discrimination against interstate commerce can be justified by reference to the "share of the costs" born by intrastate commerce "through general taxation" 114 S.Ct at 1352-53. "[P]ermitting discriminatory taxes on interstate commerce to compensate for charges purportedly included in general forms of intrastate taxation 'would allow a state to tax interstate commerce more heavily than in-state commerce anytime the entities involved in interstate commerce happened to use facilities supported by general state tax funds.'" *Id.* at 1353 n.8 (quoting *Government Suppliers Consol. Serv., Inc. v. Bayh*, 975 F.2d 1267, 1284 (7th Cir. 1992)). Just last Term this Court reaffirmed this prohibition, referring to "the danger of treating general revenue measures as relevant intrastate burdens for purposes of the compensatory tax doctrine." *Fulton Corp. v.*

Faulkner, 116 S.Ct. 848, 851 (1996). As a result, this Court "declined . . . to open such an expansive loophole in our carefully confined compensatory tax jurisprudence." *Id.* (internal quotation omitted)[19]

Just as this Court refused to permit the general burdens of taxation as "compensation" for discriminatory taxes under the Commerce Clause, so too the Court should reject the notion under the Privileges and Immunities Clause. As Justice Cardozo long ago explained, the purpose under the Commerce Clause of a truly compensatory tax scheme is to ensure that "the stranger from afar is subject to no greater burdens . . . than the dweller within the gates. The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed." *Henneford v. Silas Mason Co.*, 300 U.S. 577, 584 (1937). That purpose is equally applicable under the Privileges and Immunities Clause.

III. THIS CASES PRESENTS AN IMPORTANT AND RECURRING ISSUE MERITING THIS COURT'S REVIEW

The decision below is one in a long line of cases in which states have tried to provide economic protection for their in-state industries by burdening out-of-state competitors. In response,

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[19] This Court has been "unwilling to plunge . . . into the morass of weighing comparative tax burdens by comparing taxes on dissimilar events . . . .'" *Fulton Corp. v. Faulkner*, 116 U.S. 848, 859 (1996) (quoting *Oregon Waste Systems, Inc. v. Department of Envt'l Quality*, 114 S.Ct 1345, 1353 (1994)); *see American Trucking Ass'ns., Inc. v. Scheiner*, 483 U.S. 266, 289 (1987). This Court has recognized that "'courts as institutions are poorly equipped to evaluate with precision the relative burdens of various methods of taxation. The complexities of factual economic proof always present a certain potential for error, and courts have little familiarity with the process of evaluating the relative economic burden of taxes.'" *Fulton Corp.*, 116 S.Ct at 859 (quoting *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 589-90 & nn.12-14 (1983)).

"[t]he Court consistently has found parochial legislation of this kind to be constitutionally invalid. . . ." *Philadelphia v. New Jersey*, 437 U.S. at 626. Just last Term, this Court reaffirmed that the Commerce Clause prohibits states from imposing "regulatory measures designed to benefit in-state interests by burdening out-of-state competitors." *Fulton Corp. v. Faulkner*, 116 S.Ct. at 853 (quotation omitted). This case is unusual only in that the state has explicitly admitted that this was the purpose of the permit scheme. *See supra* at 5.

This rule applies whether the local industry being protected is milk or liquor or waste or apples or manufacturing or natural resources. *See, e.g., Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) (Hawaii tax exempting locally-produced liquor, but not liquor produced out-of-state violated Commerce Clause); *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951) (law prohibiting sale of milk unless processed within five miles of center of town held to violate Commerce Clause because it benefitted local milk producers at the expense of out-of-state milk producers); *West Lynn Creamery, Inc. v. Healy*, 114 S.Ct. 2205 (1994) (tax on milk sold to Massachusetts retailers used to subsidize in-state producers held to violate Commerce Clause); *Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334 (1992)(Alabama's imposition of higher fee on disposal of hazardous waste from other states than on the identical waste from Alabama held to violate Commerce Clause); *Oregon Waste Systems, Inc. v. Department of Environmental Quality*, 114 S.Ct. 1345 (Oregon's surcharge on out-of-state waste held to violate Commerce Clause); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (North Carolina statute that imposed costs on non-resident apple sellers that were not imposed on resident apple sellers held to violate Commerce Clause); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (Arizona statute that required all Arizona-grown cantaloupes to be packaged within the State prior to export held to violate the Commerce Clause); *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82 (1984) (Alaska regulation that required all Alaska timber taken from state lands to be processed within the State prior to export held to violate the Commerce Clause).

This Court also has held unconstitutional a Louisiana statute forbidding out-of-state transportation of shrimp taken in Louisiana waters, until the heads and shells had been removed. *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928); *see also Johnson v. Haydel*, 278 U.S. 16 (1928) (state restrictions on catching and canning of oysters destined for shipment and sale in interstate commerce violated Commerce Clause); *Hughes v. Oklahoma*, 441 U.S. 322 (1979) (Oklahoma statute which forbade transportation of natural minnows out of the state for purposes of sale, held to violate the Commerce Clause).

Under the Alaska license and permit scheme, Alaska residents are given a substantial preference, in the form of lower license and permit fees, over non-residents for purposes of fishing. Alaska does not stand alone in preferring its residents to non-residents where commercial use of natural resources is concerned. In fact, at least nineteen other states discriminate against non-residents in the imposition of commercial fishing license and permit fees.[20] This sort of resource protectionism requires this

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[20] *See, e.g.*, Ala. Code § 9-12-80 (Alabama charges non-residents nearly two times as much as residents, unless the non-resident's state has entered into a reciprocity agreement with Alabama); Cal. Fish & Game Code § 7852 (California charges non-residents almost twice as much as residents); Del. Code Ann. tit. 7 § 914 (Delaware charges non-residents ten times as much as residents); Fla. Stat. Ann. § 370.06(2) (Florida charges non-residents four times as much as residents); Ga. Code Ann. § 27-2-23 (Georgia charges non-residents nearly ten times as much as residents); Idaho Code § 36-802 (Idaho charges non-residents twice as much as residents); 515 Ill. Comp. Stat. 5/20-45, 5/20-55 (Illinois charges non-residents four times as much as residents) Iowa Code Ann. § 483A.1 (Iowa charges non-residents about twice as much as residents); La. Rev. Stat. Ann. § 56:303 (Louisiana charges non-residents almost eight times as much as residents); Me. Rev. Stat. Ann. tit. 12, § 6505 (Maine charges non-residents ten times as much as residents); Mich. Comp. Laws Ann. § 324.43532 (Michigan charges non-residents twice as much as residents); Miss. Code Ann. § 49-15-29 (Mississippi charges non-residents three times as much as residents); N.J. Stat. Ann. § 23:5-24.2 (New Jersey charges non-residents ten times as much as residents

Court's attention, particularly in light of the growing importance of the commercial fishing industry in interstate commerce.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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October 31, 1996

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pay, unless the non-resident's state would charge a New Jersey resident the same amount as a resident of that state for a similar license); N.C. Gen. Stat. § 113-152 (North Carolina charges non-residents $200.00 or an amount equal to the non-resident fee charged by a non-resident's state); Okla. Stat. Ann. tit. 29, § 4-103 (Oklahoma charges non-residents more than twice as much as residents); Or. Rev. Stat. § 508.285 (Oregon charges non-residents twice as much as residents); S.C. Code Ann. § 50-17-250 (South Carolina does not impose any discriminatory fees upon a non-resident unless that non-resident's state charges South Carolina residents a fee); Tenn. Code Ann. § 70-2-205 (Tennessee charges non-residents four times as much as residents); Tex. Parks & Wild. Code §§ 47.002, 47.007, 31 Tex. Admin. Code § 53.6 (Texas charges non-residents more than seven times as much as residents); Wash. Rev. Code Ann. § 75.28.110(1)) (Washington charges non-residents slightly less than twice what residents pay).

SUPREME COURT OF ALASKA

Donald H. CARLSON, Warren Hart, Gerard Haskins, Stephen R. Libby, Earl Weese, and Lyla C. Weese, Individually and as Class Representatives on behalf of All Persons Similarly Situated, Appellants,

v.

STATE of Alaska, Commercial Fisheries Entry Commission, Appellee.

No. S-6590.

June 21, 1996.

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Peter A. Michalski, Judge.

Loren Domke, Loren Domke, P.C., Juneau, for Appellants.

Stephen M. White, Marie Sansone, Assistant Attorneys General, and Bruce M. Botelho, Attorney General, Juneau, for Appellee.

Before RABINOWITZ, MATTHEWS, COMPTON and EASTAUGH, JJ.

OPINION

COMPTON, Justice.

I. INTRODUCTION

This is the second appeal from a class action challenging the State of Alaska's practice of charging nonresident commercial fishers licensing and limited entry permit fees which are three times greater than the fees charged resident commercial fishers. The class is comprised of "all persons who participated in one or more Alaska commercial fisheries at any time who paid

non-resident assessments to the State for commercial or gear licenses or permits." *Carlson v. State*, 798 P.2d 1269, 1270 (Alaska 1990) (*Carlson I*). In this appeal the class challenges the superior court's grant of summary judgment to the State. The class contends that the superior court misinterpreted our mandate on remand and that the fee differential violates the Commerce Clause[1] and Privileges and Immunities Clause[2] of the United States Constitution. We reverse and remand.

II. FACTS AND PROCEEDINGS

This appeal, like *Carlson I*, contests the constitutionality of AS 16.05.480, AS 16.43.160 and Alaska Administrative Code (AAC) 20.05.240.[3] Under AS 16.05.480 a resident pays $30 per year for a commercial fishing license, while a nonresident pays $90 per year for the same license. Similarly, under 20 AAC 5.240(a)(1)-(4) nonresidents pay three times more for limited entry permits. The fee for limited entry permits is determined by the value of the permit;[4] the fee range, for residents, is from $50

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[1] The United States Constitution provides:

> "The Congress shall have power . . . To regulate commerce with foreign nations, and among the several States and with the Indian Tribes."

U.S. Const. art. I, § 8, cl. 3.

[2] The Privileges and Immunities Clause of United States Constitution provides:

> "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

U.S. Const. art. IV, § 2.

[3] AS 16.43.160 is the authority under which the Commercial Fisheries Entry Commission (CFEC) adopted 20 AAC 5.240.

[4] The profitability of the different fisheries, and hence the value of permits, varies dramatically. For example, the average gross earnings per permit for the Chignik salmon seine fishery ranged from $ 88,709 to $ 265,525 for the years 1983 through 1993. The permit fee for this

to $250.[5] *See* 20 AAC 5.240(a)(1)-(4).

In *Carlson I* the class alleged:

> (1) violations of the Privileges and Immunities Clause and Commerce Clause; and (2) the absence of State statutory authority to charge this type of fee differential prior to January 1983. We rejected the class's second contention that the statute did not authorize the 3:1 differential prior to 1983.

Carlson I, 798 P.2d at 1278-79. However, as to the first issue we remanded the case and imposed on the State the burden of persuasion in defending the Commerce Clause and Privileges and Immunities challenges. *Id.* at 1274-78. With regard to the Privileges and Immunities Clause question we held:

> Commercial fishing is a sufficiently important activity to come within the purview of the Privileges and Immunities Clause, and license fees which discriminate against nonresidents are prima facie a violation of it . . . . Thus the questions here are whether the state has a substantial reason for the discrimination, and whether the 3:1 fee ratio bears a sufficiently close relationship to the goal.

Carlson I, 798 P.2d at 1274 (citations omitted). In imposing the burden of persuasion on the State on this issue we adopted the

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fishery is $ 250 for residents and $ 750 for nonresidents. During the same time period the average gross earnings per permit for the Bristol Bay herring spawn on kelp fishery ranged from $ 847 to $ 1613. The permit fee for this fishery is $ 50 for residents and $ 150 for nonresidents.

[5] The State notes that there is no evidence that this fee differential has discouraged nonresidents from participating in Alaska's commercial fisheries. During the period between 1982 and 1992 the participation of nonresidents in Alaska fisheries continued to increase. The State also emphasizes that virtually every state that has a commercial fishing industry has higher nonresident licensing and permitting fees. In many of these states the differential between resident and nonresident fees exceeds the one contested here.

Wisconsin Supreme Court's analysis. *See Taylor v. Conta*, 106 Wis.2d 321, 316 N.W.2d 814, 823 n. 17 (Wis. 1982). In doing so we held that "the burden of persuasion to demonstrate justification is properly on the state."[6] *Carlson I*, 798 P.2d at 1276.

We framed the issue on remand as, "whether all fees and taxes which must be paid to the state by a nonresident to enjoy the state-provided benefit are substantially equal to those which must be paid by similarly situated residents when the residents' *pro rata* shares of state revenues to which nonresidents make no contribution are taken into account." *Carlson I*, 798 P.2d at 1278. We also held that the revenues derived by the State from petroleum production are "analytically[ ] equivalent to 'taxes which only residents pay.' " *Carlson I*, 798 P.2d at 1278.

On remand the parties cross-moved for summary judgment, each proposing a different method by which to compare the fees being paid by nonresidents with the expenditures of state revenues to which the nonresidents make no contribution (the costs to residents). The class proposed what it termed the *per capita* formula. The *per capita* formula computes the contribution made by each resident to the cost of maintaining the commercial fisheries and compares this with the fee differential. The State proposed what it termed the *pro rata* formula. The *pro rata* formula in effect compares the total contributions made to the cost of commercial fisheries by residents to the total fees paid by nonresidents. The superior court concluded that under this method

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[6] We similarly imposed the burden of proof on the Commerce Clause challenge on the State. We held:

> [O]nce a state law is shown to discriminate against interstate commerce "either on its face or in practical effect," the burden falls on the State to demonstrate both that the statute "serves a legitimate local purpose," and that this purpose could not be served as well by available nondiscriminatory means.

Carlson I, 798 P.2d at 1277 (quoting *Main v. Taylor*, 477 U.S. 131, 138, 106 S.Ct. 2440, 91 L.Ed.2d 110 (1986)).

of analysis, residents paid by way of taxes (or their analytical equivalent) substantially more than nonresident fishers paid. In reaching this conclusion, the superior court applied the State's proposed formula to the categories of expenses accepted by us in *Carlson I*.[7] As the licensing and permitting fees charged nonresidents did not exceed the amount paid by residents, the superior court concluded that the differential did not violate either the Commerce Clause or the Privileges and Immunities Clause. The class appeals.

III. DISCUSSION

A. Standard of Review

Both parties correctly argue that the Commerce Clause and the Privileges and Immunities Clause challenges to AS 16.05.480, AS 16.43.160 and 20 AAC 5.240 present questions of constitutional law which we review *de novo*. *See Wright v. Black*, 856 P.2d 477, 479 (Alaska 1993). The issue of whether the superior court erred in adopting the *pro rata* formula to calculate the contribution to commercial fisheries management made by residents is also an issue of law which we review *de novo*. *Langdon v. Champion*, 745 P.2d 1371, 1372 n. 2 (Alaska 1987).

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[7] The State presented additional budget figures which included an analysis of every state agency for the years 1981 through 1993. The State claims that these figures included expenditures to which only Alaska residents contributed and which benefitted only commercial fishers. The class requested a stay and a reopening of discovery to address these new figures. The superior court determined that as it had not relied on the new figures in granting summary judgment, any dispute over these figures was moot. However, the court did reserve the right to reconsider this decision if this court determined that the class's *per capita* method should have been employed.

B. The Challenged Fee Differential under the Commerce Clause

The class contends that two recent Supreme Court decisions require that the different fees charged to residents and nonresidents under AS 16.05.480, AS 16.43.160 and 20 AAC 5.240 be analyzed under the Commerce Clause.[8] *See Oregon Waste Systems v. Dep't of Envtl. Quality*, 511 U.S. 93, 114 S.Ct. 1345, 1350, 128 L.Ed.2d 13 (1994); *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 112 S.Ct. 2009, 119 L.Ed.2d 121 (1992). The class argues that the fee differentials in these statutes and regulations violate the negative Commerce Clause.[9] The class

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[8] In *Carlson I* we left open the question of whether this case was governed by the Commerce Clause. We noted that earlier Supreme Court cases had suggested that the Commerce Clause does not apply to fish until the fish are actually harvested. *Carlson I*, 798 P.2d at 1276 n. 4 (citing *McCready v. Virginia*, 94 U.S. 391, 396, 24 L.Ed. 248 (1876); *Toomer v. Witsell*, 334 U.S. 385, 394-395, 68 S.Ct. 1156, 92 L.Ed. 1460, *reh'g denied*, 335 U.S. 837, 69 S.Ct. 12, 93 L.Ed. 389 (1948)).

[9] The grant of regulatory power to Congress implicit in the Commerce Clause has been interpreted to have a "negative" aspect "that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Systems, Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 114 S.Ct. 1345, 1349, 128 L.Ed.2d 13 (1994) (*citing Wyoming v. Oklahoma*, 502 U.S. 437, 112 S.Ct. 789, 117 L.Ed.2d 1 (1992)). A negative Commerce Clause analysis has two steps. First, the court must determine whether the challenged statute discriminates against interstate commerce or "regulates evenhandedly with only 'incidental' effects on interstate commerce." *Oregon Waste Systems*, 114 S.Ct. at 1350 (citations omitted). Second, "[i]f the restriction is discriminatory—i.e., favors in-state economic interests over their out-of-state counterparts—it is virtually *per se* invalid." *Id.* at 1347. A restriction found to be *per se* invalid must be struck down unless the state can "show that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Id.* at 1351 (citations omitted). The justifications for a discriminatory tax or restriction must pass the strictest

argues AS 16.05.480, AS 16.43.160 and 20 AAC 5.240 are *per se* invalid under the Commerce Clause. A substantial portion of the class's briefs is devoted to analogizing the different commercial licensing and permit fees charged residents and nonresidents to surcharges the states of Oregon and Alabama imposed on out-of-state waste. The Supreme Court struck down these surcharges. *Oregon Waste Systems*, 114 S.Ct. at 1355; *Chemical Waste*, 504 U.S. at 334. The class contends that under the reasoning employed in *Oregon Waste Systems* and *Chemical Waste*, the 3:1 fee differential is tantamount to "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Systems*, 114 S.Ct. at 1350.

Oregon Waste Systems does not require that the fee differential challenged herein be evaluated under the Commerce Clause. In both *Oregon Waste Systems* and *Chemical Waste*, the Court found taxes imposed on out-of-state waste which were greater than the taxes imposed on in-state waste violated the negative Commerce Clause. In applying the negative Commerce Clause analysis in *Oregon Waste Systems*, the Court emphasized that the Commerce Clause prohibits states from unjustifiably discriminating against or burdening the interstate flow of articles of commerce. *Oregon Waste Systems*, 114 S.Ct. at 1349. The Court went on to hold that "[i]t is well-established, however, that a law is discriminatory if it 'tax[es] a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State.'" *Oregon Waste Systems*, 114 S.Ct. at 1350 (quoting *Chemical Waste*, 504 U.S. at 342, ___ S.Ct. at ___).

Unlike the fee differentials in *Oregon Waste Systems* and *Chemical Waste*, the fee differentials at issue in this case are not

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scrutiny. *Id.* at 1351. However, if the restriction is nondiscriminatory it is valid unless the burden it imposes on interstate commerce "is clearly excessive in relation to the putative local benefits." *Id.* (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970)).

predicated upon the movement of articles of commerce across state lines, but rather upon the residency status of those applying for permits. The Supreme Court has consistently analyzed statutes which purportedly classify on the basis of residency under the Privileges and Immunities or the Equal Protection Clauses.[10] In *Toomer v. Witsell*, 334 U.S. 385, 68 S.Ct. 1156, 92 L.Ed. 1460 (1948), the Court evaluated South Carolina shrimping license fees, which were one hundred times greater for non-residents than for residents, under the Privileges and Immunities Clause. There the Court observed that the Privileges and Immunities Clause "was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy."[11] *Toomer*, 334 U.S. at 395.

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[10] *See United Bldg. & Const. v. Mayor & Council of Camden*, 465 U.S. 208, 215-19, 104 S.Ct. 1020, 79 L.Ed.2d 249 (1984) (analyzing a municipal resident hiring preference under the Privileges and Immunities Clause); *Hicklin v. Orbeck*, 437 U.S. 518, 524, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978) (evaluating under the Privileges and Immunities Clause the Alaska Hire Law which preferenced Alaska residents in hiring); *Sosna v. Iowa*, 419 U.S. 393, 406, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975) (reviewing Iowa's durational residency requirement for divorces under the Privileges and Immunities Clause); *see also Baldwin v. Fish & Game Comm'n of Montana*, 436 U.S. 371, 383, 98 S.Ct. 1852, 56 L.Ed.2d 354 (1978) (stating that the Privileges and Immunities Clause "has been interpreted to prevent a State from imposing unreasonable burdens on Citizens of other States in their pursuit of common callings within the State" (citations omitted)).

[11] In *Anderson v. Mullaney*, 191 F.2d 123 (9th Cir.1951), *aff'd* 342 U.S. 415, 72 S.Ct. 428, 96 L.Ed. 458 (1952), the Ninth Circuit struck down on Commerce Clause grounds an Alaska territorial statute which charged non-resident fishermen a higher license fee than resident fishermen. On certiorari the Supreme Court affirmed on Privileges and Immunities rather than Commerce Clause grounds, following *Toomer v. Witsell*. Assuming that the Commerce Clause would also apply to cases of this nature, it is difficult to believe that a license fee differential which passes muster under the Privileges and Immunities analysis would nonetheless be an unconstitutional discrimination against interstate

C. The Challenged Fee Differential under the Privileges and Immunities Clause

The class contends also that the nonresident fee differential violates the Privileges and Immunities Clause of the United States Constitution. The Privileges and Immunities Clause is not absolute. "[I]t does not preclude disparity of treatment [of citizens of other states] in the many situations where there are perfectly valid independent reasons for it." *Toomer*, 334 U.S. at 396. A claim that a residency classification violates the Privileges and Immunities Clause requires a two-step inquiry:

> First, the activity in question must be sufficiently basic to the livelihood of the Nation . . . as to fall within the purview of the Privileges and Immunities Clause. . . .
>
> Second, if the challenged restriction deprives nonresidents of a protected privilege, we will invalidate it only if we conclude that the restriction is not closely related to the advancement of a substantial state interest.

Supreme Court of Virginia v. Friedman, 487 U.S. 59, 64-65, 108 S.Ct. 2260, 101 L.Ed.2d 56 (1988) (internal quotations and citations omitted).

We determined in *Carlson I* that commercial fishing is a sufficiently important activity to come within the purview of the Privileges and Immunities Clause. 798 P.2d at 1274. However, the class claims that for us to find for the State on the relatedness prong of the inquiry, the State "must demonstrate that behind the nonresident surcharge or differential is a[sic] (1) substantial reason advancing a legitimate State policy and (2) the means employed by the statutory scheme must be closely tailored and have a substantial relationship to a legitimate interest served by the statute." Appellant's Brief at 27.

We have already made the first inquiry. In *Carlson I*, we held that equalizing the burden of fisheries management, "where

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commerce.

residents pay proportionately more in foregone benefits than nonresidents for fisheries management," was a substantial State interest. *Id.* at 1278. However, we concluded that the record did not contain sufficient evidence to determine whether the differential in fees charged residents and nonresidents was sufficiently related to this interest to justify such disparate treatment. *Id.* at 1278.

The class questions the relatedness of the fee differential to the burden of fisheries management borne by residents. It analogizes this case to other Supreme Court cases, and challenges our conclusion in *Carlson I* that petroleum revenues are the analytical equivalent of taxes. The class argues that *Oregon Waste Systems* prohibits the State from arguing that the fee differentials do not discriminate against nonresidents because they merely impose on nonresidents their share of the costs of fisheries management. It claims that under the reasoning of *Oregon Waste Systems*, neither general tax revenues nor oil royalty revenues can be viewed as the residents' contributions to fisheries management.[12]

There are two flaws with the class's argument. First, *Oregon Waste Systems* was a Commerce Clause case. *See Oregon Waste Systems*, 114 S.Ct. at 1349. Although the reasoning in Privileges and Immunities Clause cases has been used in Commerce Clause cases, it is not analytically sensible to do the reverse in this case. In this case the Privileges and Immunities Clause question turns on whether there is a sufficient relationship between the higher fees charged nonresidents and the State's interest in imposing on nonresidents their share of the costs for managing the State's commercial fisheries. In *Oregon Waste Systems*, the issue was whether the interstate and intrastate taxes are imposed on sufficiently equivalent events such that they could be considered proxies for each other. *See Id.* at 1352-53. These are different

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[12] The class calls this its "attribution of tax revenues" argument.

inquires for which the analysis is not interchangeable.[13]

Second, the class's argument demonstrates a lack of understanding of our holding in *Carlson I*. Contrary to the class's contentions, we did not advocate the kind of fee-shifting denounced by the Supreme Court in *Oregon Waste Systems*. In *Carlson I* we did not advance a compensatory tax doctrine which would impose on nonresidents their entire share of the costs of commercial fisheries management, while resident fishers' share of these costs was borne by the entire population of the State. Rather, we held that the issue is

> whether all fees and taxes which must be paid to the state by a nonresident to enjoy the state-provided benefit are substantially equal to those which must be paid by similarly situated residents when the residents' *pro rata* shares of state revenues to which nonresidents make no contribution are taken into account.

Carlson I, 798 P.2d at 1278. The disparate fees charged to nonresidents will not offend the Privileges and Immunities Clause if the differential does not exceed the contribution made by residents, because the differential will be justified as imposing on nonresidents their share of the costs of commercial fisheries. The fee differential merely balances out "any conservation expenditures from taxes which only residents pay." *Toomer*, 334 U.S. at 399.[14] In *Carlson I* we held that the State bore the burden

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[13] Additionally, the Supreme Court in *Oregon Waste Systems* had reasons other than the disparity between the events being taxed for finding that the Department of Environmental Quality's compensatory tax argument was disingenuous. For example, the Court expressed concern over the fact that the out-of-state surcharge was actually assessed on in-state shippers who already paid Oregon income taxes, the very tax the surcharge supposedly balanced out. *See Oregon Waste Systems*, 114 S.Ct. at 1353.

[14] In *Oregon Waste Systems*, the Court gave no indication that it intended to cast doubt on this aspect of *Toomer*.

of persuasion on this issue. 798 P.2d at 1276. This burden should be met by calculating the contribution made by residents and comparing it with the challenged fee differentials.

D. The State's *Pro Rata* Method of Calculating the Amount Residents Contribute to Fisheries Management

To establish "practical equality" between residents and nonresidents, the State must demonstrate that the higher fees charged nonresidents are equivalent to the burden borne by residents as measured by the "residents' *pro rata* shares of state revenues to which nonresidents make no contribution." *Carlson I*, 798 P.2d at 1278. The *per capita* formula propounded by the class is the correct method for calculating the contribution made by residents.

Under the *per capita* formula the resident contribution is calculated in the following manner: (Fisheries Budget/Alaska Population) X (percentage of State Budget from oil revenues/1.0). *See* Appendix A. Once this computation is made the resident contribution can be compared to the difference in fees paid by nonresidents to determine if the fee differential is constitutional.

The State advocates a different formula for computing the resident contribution. The State's formula utilizes a three-step approach. The State would (1) calculate the expenditures or costs of the commercial fisheries (enforcement and conservation); (2) determine the resident and nonresident commercial fishers' respective *pro rata* shares of those expenditures; and (3) compare the percentage of its respective *pro rata* share each group is paying. *See* Appendix A.

The State's formula differs from the class's when it comes to deciding how to determine the numbers to be used in steps two and three. Although the formulae are theoretically different and are calculating different quantities, the significant difference between the two proposed formulae concerns how the residents' *pro rata* share is calculated. As discussed above, the class argues that the amount used as the divisor of the commercial fisheries expenditures from taxes which only residents pay must be the

total number of Alaskans. It correctly asserts that using this number will allow the court to determine the *per capita* contribution actually being made by each of the resident permit holders. On the other hand, the State argues that the holdings in *Toomer* and *Carlson I* mandate that the residents' contribution should be determined by dividing the fisheries' expenditures from taxes by the number of resident permits issued in any given year.[15] The State is wrong. As stated above, in *Carlson I* we held that the relevant inquiry was

> "whether all fees and taxes which must be paid to the state by a nonresident to enjoy the state- provided benefit are substantially equal to those which must be paid by similarly situated residents when the residents' *pro rata* shares of state revenues to which nonresidents make no contribution are taken into account."

Carlson I, 798 P.2d at 1278. Thus, we ordered the superior court to compare the relative burden placed on resident and nonresident commercial fishers. The *per capita* method does just this. Had *Carlson I* mandated a comparison of the expenditures made by the State to the contribution made by nonresident fishers, the State's theory would be correct.[16] Resident commercial fishers are paying the license and permit fees they are charged plus their *per capita* share of oil revenues which are diverted to fisheries management from other benefits or State services. It is this quantity which must be equivalent to the fee differential for the fees to be constitutional under the *Carlson I* analysis. *See*

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[15] This is not exactly accurate because the State's formula never calculates the actual amount that each individual resident is purported to contribute. Rather, the State's formula calculates the percentages of their fair share of costs residents and nonresidents pay.

[16] However, this would be just the kind of compensatory tax rationale which the Supreme Court struck down in *Oregon Waste Systems*.

Carlson I, 798 P.2d at 1278.[17]

As we have concluded that the resident contribution must be calculated using the class's *per capita* formula, we remand the case for the application of this formula. If under the formula the fee differential exceeds the resident contribution, the State will have failed to demonstrate that the means employed by its statute have a substantial enough relationship to the legitimate interest of the statute to survive Privileges and Immunities Clause review. Conversely, if the superior court finds that the fee differential is not greater than the resident contribution, the State has successfully carried its burden of proving that the means employed by its statutory scheme are substantially related to the legitimate interest served by the statute. On remand the superior court shall address issues relating to the additional budget figures presented by the State. It will need to determine whether to accept these new figures and decide whether it should grant a stay and reopen

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[17] The State also argues that the *per capita* formula should be rejected because it has never been used by any court in any context. The State cites a string of equal protection cases to support this assertion. *See Baldwin*, 436 U.S. 371, 98 S.Ct. 1852, 56 L.Ed.2d 354 (1978); *LCM Enterprises, Inc. v. Town of Dartmouth*, 14 F.3d 675 (1st Cir. 1994); *Johns v. Redeker*, 406 F.2d 878 (8th Cir. 1969). However, these equal protection cases have no bearing on the suitability of the *per capita* approach in this case. In *Baldwin* the comparison being made was between the state's costs for maintenance of the big-game populations, not the contributions made by resident big game hunters to the maintenance of big- game populations. *Baldwin*, 436 U.S. at 389. Additionally, in *Baldwin* the calculations were being viewed under the rational basis test, a more lenient standard than the intermediate scrutiny required in this case. *Baldwin*, 436 U.S. at 390-91. Similarly, *LCM Enterprises* is inapplicable because it too involved the application of the rational basis test, which only requires that the classification being challenged is rationally related to the legitimate state interest. *LCM Enterprises*, 14 F.2d at 679. *Johns* also has no relevance to the issue at hand because the court in *Johns* does not discuss the method the trial court used to determine the resident contribution which was being compared with the higher fees charged to nonresidents. *Johns*, 406 F.2d at 883.

discovery in order to allow the class to respond to the State's presentation of these new figures.

E. Prejudgment Interest of the Unlawful Portion of the License Fees from the Date the Class Action Was Filed

The class seeks a refund under AS 43.10.210,[18] of all unlawfully exacted fees from the date of filing the lawsuit with statutory prejudgment interest calculated under AS 45.45.010. In *Carlson I* we held that AS 43.15.010 would govern any refund in this case, and that if the class succeeded on its constitutional claims it could only recover unlawfully collected fees if it could satisfy the protest requirement of AS 43.15.010. 798 P.2d at 1279-80. We remanded for further findings on whether the State had waived the protest requirement, thereby allowing a refund of all fees not barred by the statute of limitations. *Id.* The superior court found that the State had not waived the protest requirement.

The class admits that it could not have satisfied the protest requirement for the taxes paid prior to the filing of the lawsuit, and thus does not seek a refund of any unlawfully assessed fees paid prior to June 22, 1984. However, the class claims that the filing of the complaint in the case at bar fulfills the protest requirement.

Although the State does not address this issue in its brief, the record indicates that the State agrees that those fees which were paid after June 22, 1984, were paid under protest sufficient to permit a refund under AS 43.10.210. This does not mean that the State concedes that any refund would be due if the class

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[18] AS 43.15.010 was renumbered 43.10.210. AS 43.10.210(a) provides:

> The Department of Administration shall, with the approval of the attorney general and the Department of Revenue, refund to a taxpayer the amount of a tax paid to the Department of Revenue under protest and deposited in the treasury if
>
> (1) the taxpayer recovers judgment against the Department of Revenue for the return of the tax . . . .

succeeds. The State argued below that it only had conceded that the protest requirement of AS 43.10.210 had been met, and that this "is merely one precondition to the '[r]ecovery of overpayments and protested payments.'" Because the State does not brief this issue, it is impossible to know whether it would still make this argument.

If on remand the superior court determines that the class has prevailed, the superior court must also decide whether the filing of this suit constituted notice sufficient to comply with the protest requirement of AS 43.10.210(a), and whether prejudgment interest is due under AS 45.45.010.

IV. CONCLUSION

We conclude that this appeal does not implicate the Commerce Clause. We REVERSE the superior court's approval of the State's *pro rata* formula of calculating and comparing the taxation burden placed on resident and nonresident commercial fishers, and we REMAND for application of the class's *per capita* formula. We also order that on remand the superior court address the unresolved issues concerning the appropriate budget items to be considered in determining the State's expenditures (i.e., resident contributions). Additionally, if the superior court finds for the class, it must determine the date from which the class should be given a refund, and what, if any, interest is due on that refund.

V. APPENDIX

The following is a comparison of the two proposed formulae which uses the statistics proffered by the State for the years 1982 through 1989. It is difficult to compare the State's and class's formulae because they calculate and compare different quantities in an attempt to measure what residents and nonresidents are paying. The class's formula calculates the fee differential which would be allowable, while the State's formula computes the respective percentages of costs of running the commercial fisheries which residents and nonresidents could pay and still be "treated similarly."

A. Application of the Class's *Per Capita* Formula

The class's *per capita* formula: Fisheries Budget/Alaska Population X Percentage State Budget from Oil Revenues.

1982:	$29,000,000 / 500,000[19]	X 83%	= $48.14
1983:	$31,000,000 / 500,000	X 81%	= $50.22
1984:	$34,000,000 / 500,000	X 82%	= $55.76
1985:	$34,800,000 / 500,000	X 82%	= $57.07
1986:	$34,500,000 / 500,000	X 86%	= $59.34
1987:	$29,600,000 / 500,000	X 76%	= $44.99
1988:	$29,300,000 / 500,000	X 83%	= $48.64
1989:	$29,900,000 / 500,000	X 82%	= $49.04

Under the *per capita* formula the allowable fee differential will vary from year to year. For example, in 1982 the difference between a resident and nonresident permit could not substantially exceed $48.14, while in 1986 the difference could not substantially exceed $59.34.

B. Application of the State's *Pro Rata* Formula

The State's formula calls for the comparison of two calculations: (1) Fair Share of Resident Costs = (Residents' *Pro Rata* Share[20] x (Fisheries Budget x Percentage of State Revenue from Oil); and (2) Fair Share Nonresident Costs = (Nonresidents' *Pro Rata* Share[21] x (Fisheries Budget x Percentage of State Revenue from Oil).

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[19] For the purpose of this example we will assume that the population of Alaska is 500,000.

[20] Residents' *Pro Rata* Share: (Percentage of Permits Held by Residents) X (Fisheries Budget).

[21] Nonresidents' *Pro Rata* Share: (Percentage of Permits Held by Nonresidents) x (Fisheries Budget).

The following two tables are the application of these formulae.

Percentage of State's Commercial Fishery Expenditures Paid By Residents:

Fiscal Year	Column 1 % of Limited Entry Permits Held By Residents	Column 2 Total Expenditures By Four Agencies For Commercial Fishery Management	Column 3 Residents' *Pro Rata* Share of Total Expenditures	Column 4 % of the Total State Revenues To Which Nonresidents Make No Contribution
1982	83%	$ 29.0	$ 24.1	83%
1983	84%	$ 31.0	$ 26.0	81%
1984	85%	$ 34.0	$ 28.9	82%
1985	84%	$ 34.8	$ 29.2	82%
1986	84%	$ 34.5	$ 29.0	86%
1987	82%	$ 29.6	$ 24.3	76%
1988	82%	$ 29.3	$ 24.0	83%
1989	82%	$ 29.9	$ 24.5	82%

Column 5 Residents' *Pro Rata* Share of Expenditures From Revenues To Which Non-residents Make No Contribution	Column 6 Residents' Fees Paid For Licenses and Permits	Column 7 Total Amount Paid By Residents To Partici-pate in Commercial Fisheries	Column 8 % Paid By Residents of Their *Pro Rata* Share of State Expendi-tures For Commercial Fisheries
$ 20.0	1.3	$ 21.3	88%
$ 21.1	1.3	$ 22.4	86%
$ 23.7	1.2	$ 24.9	86%
$ 23.9	1.5	$ 25.4	87%
$ 24.9	1.5	$ 26.4	91%
$ 18.5	1.7	$ 20.2	83%
$ 19.9	2.0	$ 21.9	91%
$ 20.1	2.0	$ 22.1	90%

Percentage of State's Commercial Fishery Expenditures Paid By NonResidents:

Fiscal Year	Column 1 % of Limited Entry Permits Held By NonResidents	Column 2 Total Expenditures By Four Agencies For Commercial Fishery Management	Column 3 NonResidents' *Pro Rata* Share of Total Expenditures
1982	17%	$29.0	$4.9
1983	16%	$31.0	$5.0
1984	15%	$34.0	$5.1
1985	16%	$34.8	$5.6
1986	16%	$34.5	$5.5
1987	18%	$29.6	$5.3
1988	18%	$29.3	$5.3
1989	18%	$29.9	$5.4

Column 4 Nonresidents' Fees Paid For Licenses and Permits	Column 5 % Paid By Nonresidents of Their *Pro Rata* Share of State Expenditures For Commercial Fisheries
$1.3	27%
$1.2	24%
$1.0	20%
$1.2	21%
$1.3	24%
$1.6	30%
$2.3	43%
$2.2	41%

Under the *pro rata* formula the differential is constitutional as long as the percentage of fair costs nonresidents are paying does not exceed the percentage of fair costs that residents are paying. Thus, the fee differential was constitutional in 1983 because residents paid 86% of their share and nonresidents only paid 24% of their share. As stated in the text of the opinion, the flaw with this formula is that it treats the resident fishers as if they alone are paying the tax equivalent (percentage of revenues to which nonresidents make no contribution). For this formula to accurately calculate the resident fishers' contribution, it would need to divide the residents' *pro rata* fair share by the population of Alaska and then multiply by the number of resident fishers.

RABINOWITZ, Justice, dissenting.

The majority concludes that since *Oregon Waste Systems v. Department of Environmental Quality*, 511 U.S. 93, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994), was decided under the Commerce Clause as opposed to the Privileges and Immunities Clause, its reasoning is inapposite here. I cannot agree.

The United States Supreme Court has long acknowledged "the mutually reinforcing relationship between the Privileges and Immunities Clause of Art. IV, § 2, and the Commerce Clause — a relationship that stems from their common origin in the Fourth Article of the Articles of Confederation and their shared vision of federalism. . . ." *Hicklin v. Orbeck*, 437 U.S. 518, 531-32, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978). It has, in fact, endorsed the methodology of referring to Commerce Clause precedent in deciding claims based solely on the Privileges and Immunities Clause. *Id. See also Sestric v. Clark*, 765 F.2d 655, 664 (7th Cir.1985) ("The two clauses are part of the same document, drafted by very intelligent and careful men; why would they have wanted the same discrimination against nonresidents to be tested by a different standard, depending on which clause was cited in the complaint?").

I do not mean to suggest that the two clauses are completely interchangeable. The differences between them, however, appear to primarily involve matters of scope as opposed to content. For

example, the market regulator—market participant doctrine can shield a state from Commerce Clause attack but not from a claim based on the Privileges and Immunities Clause. *United Bldg. & Constr. Trades Council v. Mayor*, 465 U.S. 208, 221-22, 104 S.Ct. 1020, 79 L.Ed.2d 249 (1984). On the other side of the equation, the Commerce Clause protects corporations, while the Privileges and Immunities Clause does not. *Paul v. Virginia*, 75 U.S. (8 Wall) 168, 19 L.Ed. 357 (1869).

In this way discrimination predicated somehow on state affiliation can fall within the scope of the Privileges and Immunities Clause alone, the Commerce Clause alone, both clauses, or, for that matter, neither.[1] Once it has been determined that a discriminatory policy falls within the purview of one or both of these clauses, however, I am not persuaded that the methodology of the two should diverge in any significant respect. The extent to which the interpretation of these two clauses has historically been interwoven confirms this assessment.

Further, the level of scrutiny triggered by a discriminatory policy that falls within the scope of either of these clauses appears to be very nearly identical. Professor Tribe has observed that the standard of review employed in Privileges and Immunities cases is "almost as demanding as that elaborated by the Warren Court in equal protection and first amendment strict scrutiny."[2] Similarly, in *Oregon Waste Systems*, the Supreme Court observed that Commerce Clause cases "require that justifications for

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[1] A well-recognized example of this last category would be a policy of discriminating against nonresidents in the granting of recreational game or fishing license fees. This kind of state discrimination does not implicate the Commerce Clause since it does not significantly burden interstate commerce, and it does not implicate the Privileges and Immunities Clause because it does not involve a fundamental right. *See, e.g., Baldwin v. Fish and Game Comm'n of Montana*, 436 U.S. 371, 98 S.Ct. 1852, 56 L.Ed.2d 354 (1978).

[2] Lawrence H. Tribe, *American Constitutional Law* § 6-35, at 544 (2d ed.1988).

discriminatory restrictions on commerce pass the 'strictest scrutiny.'" *Oregon Waste Systems*, 114 S.Ct. at 1351. Under both clauses, the burden is placed on the state to provide a sufficient justification for its discriminatory policy.

Considering the significant similarities between the two clauses, it not surprising that in *Carlson I* we simply referenced our Privileges and Immunities Clause analysis in order to dispose of the Commerce Clause issue, concluding that "[t]he analysis under Article I, section 8, clause 3 of the United States Constitution (the Commerce Clause) is quite similar, assuming that it is implicated." *Carlson I*, 798 P.2d at 1276. Indeed, we went on to state that

"[i]t would be anomalous . . . to conclude that a law facially discriminating against interstate commerce could pass muster under the Privilege and Immunities Clause yet fail under the Commerce Clause; both clauses have a common origin in the fourth article of the Articles of Confederation."

Id. at 1277 n. 5. In the wake of the United States Supreme Court's ruling in *Oregon Waste Systems*, however, the majority has reconsidered this position and concluded that, in fact, "the analysis is not interchangeable."

It is obvious that the fee discrepancy in this case implicates the Privileges and Immunities Clause. The policy is facially discriminatory, and it impairs an interest that is "fundamental" for purposes of Privileges and Immunities Clause analysis. Given the exceptionally close relationship between this clause and the Commerce Clause, I cannot, as noted above, join in the majority's summary rejection of the United States Supreme Court's reasoning in *Oregon Waste Systems*.

The justification offered by Oregon for discriminating against out-of-state interests in *Oregon Waste Systems* is very similar, if not identical, to the justification advanced by the State in the case at bar. The primary rationale is that out-of-state interests ought to be made to bear their "fair share" of the costs that their activities impose on the state. *Oregon Waste Systems*, 114 S.Ct.

at 1351; *Carlson I*, 798 P.2d at 1272. In both cases, the "share" or contribution of in-state interests is augmented by general state tax revenues, or their analytical equivalent, in order to justify the tax or fee discrepancies.[3]

In *Carlson I*, we concluded that this kind of augmentation was acceptable under the holding of *Toomer v. Witsell*, 334 U.S. 385, 68 S.Ct. 1156, 92 L.Ed. 1460 (1948). In *Toomer*, the Supreme Court stated, in dicta, that a state could "charge non-residents a differential which would merely compensate the State . . . for any conservation expenditures from taxes which only residents pay." *Id.* at 399. The Supreme Court in *Oregon Waste Systems*, however, expressing its reluctance to "plunge . . . into the morass of weighing comparative tax burdens by comparing taxes on dissimilar events[,]" explicitly rejected this type of justification for state discrimination in the Commerce Clause context. *Oregon Waste Systems*, 114 S.Ct. at 1353 (citations and internal quotation marks omitted).

The majority correctly observes that the compensatory tax doctrine, focusing on whether or not the taxes which allegedly cancel each other out are imposed on "substantially equivalent

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[3] Although the majority asserts that the fee-shifting we authorized in *Carlson I* is not the same kind of fee-shifting denounced by the Supreme Court in *Oregon Waste Systems*, I think that the similarities between the two far outweigh any potential differences. The approach authorized by the majority seems to place greater emphasis on the theoretical equality of individual contributions than the Oregon tax did. There is, however, no indication that the Oregon tax was designed to impose on out-of-state interests their "entire share" of solid waste disposal costs nor, for that matter, that the shares of disposers of in-state waste, who paid an $0.85 per ton fee, were to be borne by the entire population. More importantly, the decision in *Oregon Waste Systems* did not turn on the fact that the surcharge was excessive but rather on the conclusion that any surcharge was constitutionally offensive under the circumstances. Consequently, the majority's endorsement of the class's *per capita* approach does not sufficiently distinguish the fee discrepancies here from those in *Oregon Waste Systems*.

events," finds its origins in Commerce Clause cases. It does not follow from this observation, however, that the doctrine has no place in Privileges and Immunities analysis. There is nothing inherent in this doctrine, or the policy concerns behind it, that indicates that it should only apply to discriminatory state taxation challenged under the Commerce Clause.

In *Armco, Inc. v. Hardesty*, 467 U.S. 638, 104 S.Ct. 2620, 81 L.Ed.2d 540 (1984), the Supreme Court struck down a discriminatory tax on the grounds that "manufacturing and wholesaling are not 'substantially equivalent events' " on which compensating taxes might be imposed. *Id.* at 643. In that case, West Virginia had imposed a wholesale gross receipts tax from which local manufacturers were exempt. The policy underlying the exemption was that it would put in-state manufacturers who were wholesaling their products in West Virginia on equal footing with their out-of-state competitors who were functionally exempt from West Virginia's manufacturing tax.[4] The Court rejected this justification, observing that

> [i]f Ohio or any of the other 48 States imposes a like tax on its manufacturers — which they have every right to do — then Armco and others from out of state will pay both a manufacturing tax and a wholesale tax while sellers resident in West Virginia will pay only the manufacturing tax. *Id.* at 644.

Likewise, the Supreme Court in *Oregon Waste Systems* observed that Oregon's compensatory tax theory "ignore[s] the fact that shippers of waste from other States in all likelihood pay income taxes in other States, a portion of which might well be used to pay for waste reduction activities in those States." *Oregon Waste Systems*, 114 S.Ct. at 1353 n.7.

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[4] Presumably the only reason that the Privileges and Immunities Clause was not invoked in this case — where it would seem to be a natural choice — is that the plaintiff was a corporation not entitled to protection under that clause. As such, the *Armco* case provides an excellent example of how the "substantially equivalent events" test should apply with equal force regardless of which clause is invoked.

In this respect the "substantially equivalent events" test essentially serves to identify a significant logical flaw that often infects "fair share" justifications for discriminatory taxes. I can see no reason to assume that this flaw is any less serious when it is exposed through litigation based upon the Privileges and Immunities Clause than it is when challenged under the Commerce Clause.[5]

The justification advanced by the State in this case suffers from precisely the same defect alluded to in both *Armco* and *Oregon Waste Systems*. Specifically, a fisher from Oregon who purchases a commercial license in Alaska will no doubt be under an obligation to pay Oregon income taxes, a portion of which probably will have been used for conservation costs in that state. Accordingly, the fee discrepancy places the Oregon fisher, as a nonresident, at a competitive disadvantage. In other words, both the Alaska fisher and the Oregon fisher are obliged to contribute to a general tax fund[6] from which their respective States may draw monies to support local fisheries, but only the Oregon fisher is being called upon to pay enhanced fees.

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[5] A commentator has observed:

> While differences exist between the purposes and functions of the two constitutional clauses, they clearly exert overlapping spheres of influence. To hold the same tax invalid under one clause because it does not meet the substantially equivalent events requirement of the compensatory tax test, but valid under the other clause because it is important . . . that a state have power to preserve and regulate the exploitation of an important resource through means of a functionally compensatory tax, is surely to elevate form over substance.

Jeffrey J. Lamontagne, Note, *Oregon's Wasted Effort: The Supreme Court's Inability to Adapt its Compensatory Tax Doctrine to Solid Waste Regulations*, 19 Wm. & Mary Envtl. L. & Pol'y Rev. 345, 360 (1995) (citations and internal quotation marks omitted).

[6] The Alaskan fisher "contributes" in the form of foregone benefits from petroleum revenues.

> Restating our holding in *Carlson I*, the majority concludes that "[t]he disparate fees charged to nonresidents will not offend the Privileges and Immunities Clause if the differential does not exceed the contribution made by residents, because the differential will be justified as imposing on nonresidents their share of the costs of commercial fisheries."

Implicit in this analysis is that a share of this state's petroleum revenues, the analytical equivalent to general tax revenues, should be attributed to the resident fishers in calculating their contribution. Since I believe that the United States Supreme Court's holding in *Oregon Waste Systems* effectively forecloses this method of justifying a discriminatory tax, I cannot agree.

On the basis of the Supreme Court's reasoning in *Oregon Waste Systems*, I conclude that the fee discrepancies authorized by AS 16.05.480, AS 16.43.160 and 20 AAC 05.240 violate the Privileges and Immunities Clause of the Constitution of the United States of America.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA THIRD JUDICIAL DISTRICT AT ANCHORAGE

DONALD H. CARLSON, WARREN HART, GERARD HASKINS, STEPHEN R. LIBBY, EARL WEESE, and LYLA C. WEESE, Individually and as Class Representatives on Behalf of All Persons Similarly Situated, Plaintiffs,	)	
vs.	)	Case No. 3AN-84-5790 Civil
STATE OF ALASKA, COMMERCIAL FISHERIES ENTRY COMMISSION, Defendant.	)	

DECISION AND FINAL ORDER ON RECONSIDERATION OF THE COURT'S AUGUST 12, 1993 ORDER AND FINAL DECISION GRANTING THE STATE'S MOTION FOR SUMMARY JUDGMENT

The Supreme Court remanded this case to the superior court by a decision October 5, 1990. The Court's direction to the superior court was to have further proceedings consistent with the opinion issued. The opinion issued affirmed the trial court in part, and reversed the trial court in part.

The Supreme Court affirmed the trial court's rejection of plaintiffs' contention that the a 3:1 fee ratio was not authorized by statute prior to 1983; it reversed the trial court's ruling that the class would not be able to obtain a refund in any event, and directed the trial court to decide whether the state waived the otherwise necessary protest (the trial court having since ruled that the State did not waive the protest requirement) and limited to two

years the statute of limitations applicable, if the necessary protest of tax or a waiver of the protest requirement was made.

The Supreme Court also reversed the trial court's determination that summary judgment should be granted to the State of Alaska as to Privileges and Immunities and Commerce Clause challenges. The test the trial court is to apply regarding these clauses is "whether residents and similarly situated non-residents are being treated with substantial equality." Non-residents may be charged higher fees to make up for costs not paid for by the resident's fee rate, but paid by the residents through other taxes or their economic equivalent.

On remand the court granted summary judgment, and then granted reconsideration, which placed the motion for summary judgment back before the court.

Then the case was reassigned to the undersigned in June 1993, at which point the trial court reviewed the file and after various status hearings made the ruling that in calculating the amount of supplemental fee that the Constitution would allow the State to charge a given non-resident the proper method was to divide the total resident-only taxes (or their equivalent) spent on the commercial fishery by the population of Alaska. To this the State sought reconsideration, the court sought the class's input, and that issue is before this court to resolve by this decision.

After the trial court's ruling greatly enlarging the "divisor", the State prepared a full study of all state expenditures made in support of commercial fishing as well as additional "foregone benefits" contributed to the commercial fisheries and included them in the Supplemental Memorandum in Support of Its Motion for Summary Judgment on Remand filed November 12, 1993. The plaintiff class has opposed the court allowing the State to present additional information about the cost of fishing management. The court ruled that the court would receive additional information related to the cost of the State fishery in its order of August 12, 1993.

DECISION UPON RECONSIDERATION OF THE COURT'S AUGUST 12, 1993 RULING

The court has considered the parties' arguments regarding the proper divisor to use in calculating the acceptable discrepancy between resident and non-resident fees for fishers and HEREBY VACATES its prior ruling that *pro rata* as used in *Carlson vs. State*, 798 P2d 1269, (Alaska 1990), means *per capita*.

If the theoretical basis allowing higher fees for non-residents is the recovery of costs related to benefits provided, then the costs are properly divided by the number of users. Using a *per capita* approach, such costs could *never* be recovered in a limited entry fishery. Though recovery of 100% of costs is only theoretical, a *per capita* limitation makes no sense. For example, if *all* the fishers were non-residents, it would be necessary to have as many fishers as there are Alaskans in order to achieve fair contribution by the non-resident fishers.

The State's citation to the tuition cases also convinces the court that its August 12, 1993, ruling was in error and that the proper division of the costs of management paid only by residents by taxes and benefits foregone ought to be the number of fishers, not the number of Alaskans.

THE MOTION FOR SUMMARY JUDGMENT

Given the court's decision that it is the number of users which determines the *pro rata* cost of the benefits received it is evident that the disparity between resident and non-resident fees for commercial fishing licenses and permits is not in violation of the Privileges and Immunities or Commerce Clauses of the Constitution. Residents pay by way of taxes, or the economic equivalent of taxes, i.e., benefits foregone; substantially more than the non-resident fishers pay toward the benefits received based on the categories of expenses previously accepted by the parties and recognized by the court in *Carlson*. See, State's Supplemental Memorandum of November 1, 1993, pp. 7-8, Figures A, B. The proportion of costs paid by the non-residents regardless of the non-resident differential is always less than the proportion paid by residents. See, State's Memorandum in Support of State's Motion

for Summary Judgment, March 5, 1991, pp. 10-19; State's Supplemental Memorandum in Support . . . November 2, 1993, pp. 3-10.

The reconsideration of the August 12, 1993, ruling renders moot the parties' disputes whether the State can include other expenses than those presented at the original summary judgment motion (the court ruled that the State could), whether a stay should be granted to allow additional discovery by the plaintiff class (the court ruled that the stay was denied), and just what, if any, other items presented by the State as support of the fee disparity should be recognized by the court.

It is this last area of contention that the court will address further if the Supreme Court disagrees with its final ruling on the meaning of *pro rata* as applied to this case. When and if the court is faced with identifying additional expenses, the class will need to identify the specific portions of the budgetary analysis with which it takes issue.

The State's Motion for Summary Judgment is GRANTED. The Plaintiff class Motion for Summary Judgment is DENIED.

DATED at Anchorage, Alaska, this 25th day of July, 1994.

/s/ Peter A. Michalski

PETER A. MICHALSKI
SUPERIOR COURT JUDGE

SUPREME COURT OF ALASKA.

Donald H. CARLSON, Warren Hart, Gerald Haskins, Stephen R. Libby, Earl Weese, and Lyla C. Weese, Individually and as Class Representatives on Behalf of All Persons Similarly Situated, Appellants,

v.

STATE of Alaska, Commercial Fisheries Entry Commission, Appellee.

No. S-3290.

Oct. 5, 1990.

Loren Domke, Domke and Olmstead, P.C., Juneau, for Appellants.

Margot O. Knuth, Asst. Atty. Gen., and Douglas B. Baily, Atty. Gen., Juneau, for Appellee.

Before MATTHEWS, C.J., and RABINOWITZ, BURKE, COMPTON and MOORE, JJ.

OPINION

COMPTON, Justice.

This is a class action challenging Alaska's practice of charging nonresident commercial fishermen three times as much as resident fishermen for commercial licenses and limited entry permits. The class, consisting of "all persons who participated in one or more Alaska commercial fisheries at any time who paid non-resident assessments to the State for commercial or gear licenses or permits," alleges violations of two federal constitutional provi-

sions: the Privileges and Immunities Clause,[1] and the Commerce Clause.[2] The class also challenges the charging of differential fees from June 22, 1978 until January 1, 1983 under former 20 Alaska Administrative Code (AAC) 05.220(a) as being without statutory authority. The class seeks declaratory and injunctive relief as well as a refund of excess payments under the current "unconstitutional" regime and the 1978-1982 "unconstitutional" and "unauthorized" regime. The superior court denied relief.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. STATUTORY HISTORY

In 1949 the territorial legislature passed a law imposing a $50 commercial fishing license fee on nonresident fishermen and a $5 fee on residents, a 10:1 ratio. Ch. 66, § 2, SLA 1949. The law was struck down as violative of the Privileges and Immunities Clause of the Federal Constitution. *Mullaney v. Anderson,* 342 U.S. 415, 72 S.Ct. 428, 96 L.Ed. 458 (1952).

Beginning with statehood in 1959, the state charged differential licensing fees to resident and nonresident commercial fishermen pursuant to statute. Nonresident fishermen using most types of gear were charged three times the resident fee. *See* former AS 16.05.550, AS 16.05.570-.640; Ch. 94, art. III, § 8, SLA 1959.

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[1] The Privileges and Immunities Clause provides:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

U.S. Const. art. IV, § 2, cl. 1.

[2] The Commerce Clause provides:

> The Congress shall have the power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . .

U.S. Const. art. I, § 8, cl. 3.

Exceptions to this rule existed for setnet or long line gear under former AS 16.05.560 (2:1 ratio) and for commercial operators of a single small boat under former AS 16.05.650 (no distinction).

The Limited Entry Act became effective April 27, 1973. Ch. 79, SLA 1973, *codified* in Alaska Statutes, Title 16, Article 43.

Alaska Statute 16.43.010(a) described the purpose of the Limited Entry Act as follows:

> It is the purpose of this chapter to promote the conservation and the sustained yield management of Alaska's fishery resource and the economic health and stability of commercial fishing in Alaska by regulating and controlling entry into the commercial fisheries in the public interest and without unjust discrimination.

Alaska Statute 16.43.100(a)(6) provided that the Commercial Fisheries Entry Commission (CFEC) "shall . . . establish qualifications for the issuance of entry permits. . . ." AS 16.43.100(b) provided that the CFEC "may do all things necessary to the exercise of its powers under this chapter, whether or not specifically designated in this chapter." AS 16.43.110 provided that the CFEC "may adopt regulations, consistent with law, necessary or proper in the exercise of its powers or for the performance of its duties under this chapter."

Alaska Statute 16.43.160 was first enacted in 1973. Ch. 79, SLA 1973. Former AS 16.43.160 provided in part:

> (a) The [CFEC] shall establish annual fees for the issuance and annual renewal of entry permits or interim use permits to reflect the cost of administering this chapter. Fees collected under this section shall be paid into the general fund.
>
> (b) Annual fees established under this section shall be no less than $10 and no more than $100 and shall reasonably reflect the different rates of economic return for different fisheries.

Between 1973 and 1978, commercial fishermen were thus required to pay for both a gear license and a limited entry permit.

While gear license fees for nonresident commercial fishermen were thrice, in most instances, what they were for residents initially, entry permit fees did not distinguish between residents and nonresidents. *See* former 20 AAC 05.220 (1974).

During the 1977 legislative session, the legislature revised the commercial fishing licensing scheme. Ch. 105, SLA 1977. Gear licenses were abolished altogether. Ch. 105, § 19, SLA 1977. Alaska Statute 16.43.160(a) was amended by removing the phrase "to reflect the cost of administering this chapter." Thus, AS 16.43.160(a) then read in part: "The [CFEC] shall establish annual fees for the issuance and annual renewal of entry permits or interim use permits." Additionally, AS 16.43.160(b) was amended to increase the maximum amount the CFEC could charge for a license from $100 to $750. Ch. 105, § 15, SLA 1977. These changes became effective January 1, 1978. Ch. 105, § 20, SLA 1977.

On the effective date of these changes, the CFEC could no longer charge differential gear license fees, or for that matter any gear license fees. On this same date, the CFEC amended 20 AAC 05.220 to provide for a 3:1 nonresident fee differential for entry permits. *See* Ch. 105, § 20, SLA 1977; former 20 AAC 05.220.

It was the view of then Attorney General Avrum Gross, as demonstrated by a letter from him to then Governor Jay Hammond, that "the fees now collected for [gear] licenses would be incorporated administratively by the [CFEC] into the fee for a permit as would the 3-1 nonresident-resident fee differential." Moreover, the increase in the maximum chargeable entry fee (from $100 to $750) was believed by Attorney General Gross, as shown by another letter to Governor Hammond, to "allow entry permit fees to incorporate the license fees which would be eliminated." The letters also show that he anticipated the enactment of regulations to accomplish this incorporation.

In 1981, an informal opinion of the attorney general was issued concerning whether the 3:1 fee ratio of 20 AAC 05.240(a) was authorized by statute, following a request by the chairman of the

CFEC. 1981 Informal Op. Att'y Gen. 984. Without citing any directly supportive authority, the author concluded the differential was not authorized. *Id.* The regulations attorney for the CFEC disagreed with this assessment.

In 1982, the legislature again amended AS 16.43.160(b). This section now reads:

> (b) Annual fees established under this section shall be no less than $10 and no more than $750 and shall reasonably reflect the different rates of economic return for different fisheries. The amount of an annual fee for a nonresident shall be three times the amount of the annual fee for a resident.

The 1982 amendment thereby gave more certain authority to the CFEC to charge a 3:1 fee differential. This amendment was effective January 1, 1983. Ch. 79, § 3, SLA 1982.

B. HISTORY OF STATE EXPENDITURES AND REVENUES

The record contains a lengthy and detailed analysis of the revenues and expenditures connected with fisheries management for fiscal years 1978-1984.

The state contended below that the 3:1 fee ratio partially reimburses the state for that portion of the costs of fisheries management, enforcement and conservation attributable to nonresidents. The state, in essence, argued that it is subsidizing all commercial fishermen by not charging any of them (resident or not) his share of the costs of fisheries management.

The state's analysis identified four sources as the aggregate cost of fisheries management. First, the state included the annual operating budget of the CFEC itself (cost of issuing licenses and permits, etc.). These amounts are evidenced by state budget reports for each year in question.

Second, the state included 40.6% of the annual operating budget of the Department of Public Safety (DOPS), representing the amount spent by state law enforcement agencies in support of

commercial fisheries enforcement. The amount of the DOPS operating budget is also evidenced by state budget summaries for each year.

Third, the state included the annual operating budget of the Division of Commercial Fisheries, a division of the Department of Fish and Game. This division determines "how many fish are available each year for commercial harvesting." These expenditures are also voluminously documented by budget reports. Not counted as expenditures were "[a]dministration and [s]upport costs."

The state also included the annual operating budget of the Fisheries Rehabilitation Enhancement and Development (FRED) Division of the Department of Fish and Game. FRED

> rehabilitates and enhances fisheries by determining where and when fish are needed or wanted to be, and then producing the fish at that time and place. This is done by conducting extensive research studies and then working on the variety of projects that will implement the plans decided upon, which include establishing and running fish hatcheries, fertilizing lakes, planting fish, and cleaning up streams used by androgenous fish.

FRED's expenditures are also documented by budget breakdowns for each year. Not counted in FRED's expenditures were "[a]dministration and [s]upport costs" and sport fishing expenditures.

The state then attributed to nonresidents a percentage of these costs equal to the percentage of entry permits held by nonresidents in each year.[3]

Finally, the state presented evidence of revenues collected in connection with commercial fishing. The state included two

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[3] The evidence of record shows that this percentage of costs actually favors nonresidents, who catch more fish *per capita* and hence derive more benefit from maintenance expenditures.

sources: commercial entry permit fees and commercial fishing license fees. These numbers are again documented by budget reports.

The state then compared the percentage of expenditures attributable to nonresidents with the percentage of revenues taken in from nonresidents. In each year nonresident revenues from the sources counted falls considerably short of nonresident expenditures. *See* Appendix.

The class does not seriously dispute the factual accuracy of the foregoing figures. The amounts cited by both litigants as to expenditures suffer from only minor, immaterial discrepancies. Rather, the class disputed the inclusion of certain costs and the exclusion of certain revenues in the analysis. First, the class contended that the proper framework for examining whether nonresidents were contributing their share to fisheries management would be to contrast CFEC revenues with only CFEC expenditures, i.e. "expenses directly traceable to the costs of issuing permits and licenses." Including only these expenditures, the 3:1 fee ratio scheme results in a net profit to the state.

Alternatively, the class contended that if inclusion of all fisheries management expenditures in the analysis was appropriate, then "all sources of revenue [to the state] attributable to [nonresident] commercial fishermen" should also be included. The class urged the inclusion of "revenues derived indirectly from commercial fishermen from tax shifting by the fish processing industry, federal funds, marine fuel taxes, corporate and individual income taxes, and other sources of revenue derived from commercial fishermen." Including these indirect revenues, only in fiscal years 1983 and 1984 did expenditures exceed revenues.

C. PROCEDURAL BACKGROUND

On its first motion for summary judgment, the state prevailed on some issues, with the court finding material questions of fact remaining on others. On the Privileges and Immunities issue, the superior court held, relying on *Toomer v. Witsell*, 334 U.S. 385, 68 S.Ct. 1156, 92 L.Ed. 1460, *reh'g denied*, 335 U.S. 837, 69

S.Ct. 12, 93 L.Ed. 389 (1948), that while the issuance of licenses to fish commercially was sufficiently important to implicate the Privileges and Immunities Clause, the state had demonstrated a "permissible" reason for the discrimination. This reason was "to have the non-resident[s] pay a part of their fair share of the costs of enforcement, management and conservation of the fisheries of this state, which costs are largely borne by the residents through general fund expenditures." The superior court decided that an analysis of whether this purpose was being met by the 3:1 fee ratio required comparison of all revenues collected directly from commercial fishers, with all the expenditures by the State on maintaining, conserving, or managing the fishery. It rejected the class' two proposed methods of determining fair share contribution: 1) comparing CFEC revenues with CFEC expenditures and 2) comparing all revenues from all sources (including corporate taxes, business license taxes, fuel taxes, etc.) garnered from nonresident commercial fishers with all expenditures to maintain fisheries.

The superior court found that the state had presented evidence "of the operating budgets of the four entities of the State which are concerned with enforcement, operation, management, and conservation of the fisheries. The State's evidence indicates further that the operating budgets of these entities exceeded, in the years 1979 through 1984, the amount they collected in resident and non-resident licensing . . . ." Nevertheless, the superior court also found that there was a material question of fact as to whether the operating budgets truly reflected the costs of fisheries management.

As to the Commerce Clause challenge, the court held that commercial fishing in this state is within the reach of the Clause. It also held that the fee differential discriminated against interstate commerce on its face. However, the court reasoned that the same "legitimate local purpose" (ensuring that nonresidents pay their fair share of management costs) justified the discrimination, assuming the fee differential bore a substantial relationship to the purpose. Again, the court found the same question of material fact: whether the state's figures truly reflected the costs of

management. The court also held that there is no less restrictive way to ensure that nonresidents pay their fair share of the costs of fisheries management than to collect the money from them as a fee.

The superior court further held that the CFEC had implied authority to enact 20 AAC 05.220(a) and charge a 3:1 fee differential before 1983. The court offered several factors supporting its conclusion. First, it noted that the 3:1 entry fees were enacted concurrent with the abolition of 3:1 gear license fees. The court reasoned that the 1977 amendments, as reflected by the attorney general's letters, were intended to substitute differential entry permit fees for differential gear fees. The court also noted that the Limited Entry Act did not forbid fee ratios. The court added that AS 16.43.160(a) did not merely authorize the issuance of licenses, but instead directed the CFEC to "establish annual fees for the issuance and annual renewal of entry permits or interim use permits." Finally, the court reasoned that the deletion of the requirement that permit fees "reflect the cost of administering this chapter" from AS 16.43.160(a), along with the increase in maximum chargeable license fees, were indicative of intent to allow the CFEC to recoup to the General Fund whatever monies were expended for the management of fisheries.

Finally, the superior court held that even should the class eventually prevail, its members would not be entitled to a refund of fees extracted under an unconstitutional or unauthorized statute.

Later, the superior court reconsidered its decision that there were questions of material fact concerning whether the figures submitted by the state sufficed. Based on the state's more expansive documentation of costs and expenditures (discussed in section I B, *supra*), the court held that no question of material fact remained regarding the accuracy of the state's calculations.

The class appeals.

II. DISCUSSION

A. SUMMARY JUDGMENT WAS IMPROPERLY GRANTED AS TO THE CLASS' PRIVILEGES AND IMMUNITIES AND COMMERCE CLAUSE CHALLENGES

The Privileges and Immunities Clause of article IV, section 2 of the United States Constitution provides: "[t]he citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

> The primary purpose of this clause . . . was to help fuse into one Nation a collection of independent, sovereign States. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy . . . . In line with this underlying purpose, it was long ago decided that one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State.

Toomer v. Witsell, 334 U.S. 385, 395-96, 68 S.Ct. 1156, 1162, 92 L.Ed. 1460, *reh'g denied,* 335 U.S. 837, 69 S.Ct. 12, 93 L.Ed. 389 (1948) (footnote omitted).

Less favorable treatment by the state towards nonresidents runs afoul of the Privileges and Immunities Clause if: 1) the activity in question is " 'sufficiently basic to the livelihood of the Nation' . . . as to fall within the purview of the [clause]," and 2) "[it] is not closely related to the advancement of a substantial state interest." *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 64-65, 108 S.Ct. 2260, 2264, 101 L.Ed.2d 56 (1988) (citations omitted). *See also Toomer*, 334 U.S. at 396, 68 S.Ct. at 1162; *Robison v. Francis*, 713 P.2d 259, 263-64 (Alaska 1986). In determining whether the discrimination bears a close relationship to the permissible purpose, the availability of less restrictive means is relevant. *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 284, 105 S.Ct. 1272, 1278, 84 L.Ed.2d 205 (1985); *Robison*, 713 P.2d at 264.

Commercial fishing is a sufficiently important activity to come within the purview of the Privileges and Immunities Clause, and license fees which discriminate against nonresidents are prima facie a violation of it. *See Toomer*, 334 U.S. at 397, 68 S.Ct. at 1162; *Mullaney v. Anderson*, 342 U.S. 415, 417-18, 72 S.Ct. 428, 429-30, 96 L.Ed. 458 (1952). *Compare Baldwin v. Fish & Game Comm'n of Montana*, 436 U.S. 371, 388, 98 S.Ct. 1852, 1862, 56 L.Ed.2d 354 (1978) (sport or recreational hunting not protected by Privileges and Immunities Clause). Thus the questions here are whether the state has a substantial reason for the discrimination, and whether the 3:1 fee ratio bears a sufficiently close relationship to the goal. The class argues both that there is no "substantial reason" for the discrimination, and that even if there is, the fee differential is not "closely related" to furthering the purpose.

In *Toomer*, South Carolina sought to justify a 100:1 ratio by arguing that its "conservation program for [fisheries] requires expenditure of funds beyond those collected in license fees--funds to which residents and not non-residents contribute." *Toomer*, 334 U.S. at 398, 68 S.Ct. at 1163. The Court held that it was permissible "*to charge non-residents a differential which would merely compensate the State for any added enforcement burden they may impose or for any conservation expenditures from taxes which only residents pay.*" *Id.* at 399, 68 S.Ct. at 1163 (emphasis added). However, the Court also held that South Carolina had not established a relationship between the justification and the differential fee. "Nothing in the record indicates that non-residents use larger boats or different fishing methods than residents, that the cost of enforcing the laws against them is appreciably greater, *or that any substantial amount of the State's general funds is devoted to [fisheries] conservation.*" *Id.* at 398, 68 S.Ct. at 1163 (emphasis added).

Mullaney dealt with Alaska's territorial predecessor to the differential fee scheme at issue here. The territorial scheme imposed a $5 license fee on resident commercial fishermen, and a $50 fee on nonresidents, a 10:1 ratio. Ch. 66, § 2, SLA 1949; *see also Mullaney*, 342 U.S. at 416, 72 S.Ct. at 429. In

Mullaney, Alaska, as did South Carolina in *Toomer*, asserted that the discriminatory fee was justified by a substantial reason; to wit, "the higher cost of enforcing the license law against nonresident fishermen." *Id.* at 417-18, 72 S.Ct. at 430.

The *Mullaney* Court reiterated its suggestion in *Toomer* that this would be a sufficient reason to impose a discriminatory fee, but again held that there was "nothing to indicate that [the fee differential] 'would merely compensate' for the added enforcement burden." *Id.* at 418, 72 S.Ct. at 430. According to the *Mullaney* Court, "[c]onstitutional issues affecting taxation do not turn on even approximate mathematical determinations. But something more is required than a bald assertion to establish a reasonable relation between the higher fees and the higher cost to [Alaska]." *Id.*

Subsequent to *Mullaney*, non-fisheries cases have resounded the "more than a bald assertion" theme. In *Austin v. New Hampshire*, 420 U.S. 656, 95 S.Ct. 1191, 43 L.Ed.2d 530 (1975) the Court found

> no support in the record for the assertion of the court below that the [tax] creates no more than a "practical equality" between residents and nonresidents when the taxes paid only by residents are taken into account. "[S]omething more is required than bald assertion--by the state court or by counsel here-to establish the validity of a taxing statute that on its face discriminates against nonresidents."

Id. at 666 n. 10, 95 S.Ct. at 1197 n. 10 (citation omitted).

In *Hicklin v. Orbeck*, 437 U.S. 518, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978), Alaska's local hire law failed Privileges and Immunities scrutiny for this same reason.

> [A]lthough the statute may not violate the [Privileges and Immunities] Clause if the State shows "something to indicate that non-citizens constitute a peculiar source of evil at which the statute is aimed," . . . and, beyond this, the State "has no burden to prove that its laws are not violative of the . . .

> Clause," . . . certainly no showing was made on this record that nonresidents were "a peculiar source of the evil" Alaska Hire was enacted to remedy, namely, Alaska's "uniquely high unemployment." . . . What evidence the record does contain indicates that the major cause of Alaska's high unemployment was not the influx of nonresidents seeking employment, but rather the fact that a substantial number of Alaska's jobless residents—especially the unemployed Eskimo and Indian residents—were unable to secure employment either because of their lack of education and job training or because of their geographical remoteness from job opportunities; and that the employment of nonresidents threatened to deny jobs to Alaska residents only to the extent that jobs for which untrained residents were being prepared might be filled by nonresidents before the residents' training was completed.

Id. at 526-27, 98 S.Ct. at 2488 (citations and footnote omitted).

How much record support is needed under these cases to demonstrate a sufficiently "close connection" to a legitimate state purpose remains unclear. One court has noted:

> [T]here is a certain ambiguity in the Supreme Court cases concerning the burden of going forward with the evidence and the burden of persuasion of the challenger and the state. . . . Justice Brennan dissenting in Baldwin discussed the burdens on the challenger and the state in a privileges and immunities case as follows: "Although a State has no burden to prove that its laws are not violative of the Privileges and Immunities Clause, its mere assertion that the discrimination practiced against nonresidents is justified by the peculiar problem nonresidents present will not prevail in the face of a prima facie showing that the discrimination is not supportable on the asserted ground."

Justice Brennan, writing for the Court in *Hicklin*, discussed the burdens in a privileges and immunities case in the following language: "For although the statute may not violate the Clause if the State shows 'something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is

aimed,' and, beyond this, the State 'has no burden to prove that its laws are not violative of the . . . Clause,' certainly no showing was made on this record that non-residents were 'a peculiar source of the evil [the statute] was enacted to remedy . . . .' "

Professor Tribe comments on the burden of proof in a privileges and immunities case as follows: "The standard of review employed in *Toomer* . . . characterized by a shift in the burden of proof to the discriminating state and by an insistence on a fairly precise fit between remedy and classification, is almost as demanding as that elaborated by the Warren Court in equal protection and first amendment strict scrutiny."

Another commentator . . . described the burden of proof rule established in *Hicklin* as follows: "[Justice Brennan in *Hicklin*] departed from the traditional allocation of the burden of proof in cases arising under the clause. Before *Hicklin*, the nonresident had the burden of disproving the validity of the justifications offered by the state. *Hicklin* places a duty on the state to demonstrate a relationship between the presence of nonresidents and the problem which the state purports to alleviate. The shift of the burden of proof in this first prong discards the presumption of constitutionality that a statute normally enjoys and is inconsistent with Justice Brennan's position in Baldwin that the state had this burden only after the nonresident had made a 'prima facie showing that the discrimination is not supportable on the asserted grounds.' While Justice Brennan offered no explanation for this shift, it is consistent with his concern for the individual's interest.

Although the United States Supreme Court cases are not clear, we conclude that the challengers of the statutes in the case at bar bear the burden of producing evidence demonstrating the discriminatory effect of the statute on non-residents. If a discriminatory effect is shown, the state has the burden of producing 'something to indicate that nonresidents constitute a peculiar source of evil at which the statute is aimed' . . . if the state makes such a showing, the challengers have the burden

> of showing the discrimination is "not supportable on the asserted grounds."

Taylor v. Conta, 106 Wis.2d 321, 316 N.W.2d 814, 823 n. 17 (1982) (citations omitted). *Contra, Silver v. Garcia,* 592 F.Supp. 495, 498 (D.P.R. 1984); *Glenovich v. Noerenberg,* 346 F.Supp. 1286, 1293 (D. Alaska), *aff'd,* 409 U.S. 1070, 93 S.Ct. 687, 34 L.Ed.2d 660 (1972) (state bears the burden of justification). We are persuaded by the Wisconsin Supreme Court's analysis, and agree with its conclusion that the burden of persuasion to demonstrate justification is properly placed on the state.

The analysis under Article I, section 8, clause 3 of the United States Constitution (the Commerce Clause) is quite similar, assuming that it is implicated.[4]

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[4] Early cases suggested that the Commerce Clause does not come into play until the fish are actually harvested, *e.g., McCready v. Virginia,* 94 U.S. 391, 396, 24 L.Ed. 248 (1876); *Toomer,* 334 U.S. at 394-95, 68 S.Ct. at 1161-62 (Commerce Clause not implicated by a nondiscriminatory tax where taxable event, the taking of shrimp, "occurs before the shrimp can be said to have entered the flow of interstate commerce."); *Alaska v. Arctic Maid,* 366 U.S. 199, 203, 81 S.Ct. 929, 932, 6 L.Ed.2d 227 (1961) (actual taking of fish is a "local activity" outside the Commerce Clause, despite the fact that the fish are destined for interstate commerce). *See also Tangier Sound Watermen's Ass'n v. Douglas,* 541 F.Supp. 1287, 1301-06 (E.D.Va.1982) (review of the cases); *State v. Reefer King Co., Inc.,* 559 P.2d 56, 64 (Alaska 1976), *modified on reh'g,* 562 P.2d 702 (Alaska 1977) (taxes distinguishing between floating and shorebased processors do not implicate Commerce Clause where statute excludes interstate movement of "floaters" from taxation).

Dictum in more recent cases, however, suggests the contrary.

> [While] at earlier times in our history there was some doubt whether Congress had power under the Commerce Clause to regulate the taking of fish in state waters, there can be no question today that such power exists where there is some effect on interstate commerce. The movement of vessels from one State to another in search of fish,

The Commerce Clause grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." "Although the Clause thus speaks in terms of powers bestowed upon Congress, the Court long has recognized that it also limits the power of the States to erect barriers against interstate trade." *Maine v. Taylor,* 477 U.S. 131, 137, 106 S.Ct. 2440, 2447, 91 L.Ed.2d 110 (1986) (*quoting Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 35, 100 S.Ct. 2009, 2015, 64 L.Ed.2d 702 (1980)). "[O]nce a state law is shown to discriminate against interstate commerce 'either on its face or in practical effect,' the burden falls on the State to demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by

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and back again to processing plants, is certainly activity which Congress could conclude affects interstate commerce.

Douglas v. Seacoast Products, Inc., 431 U.S. 265, 281-82, 97 S.Ct. 1740, 1750, 52 L.Ed.2d 304 (1977) (citations and footnote omitted).

Hicklin also suggests that the Commerce Clause applies to this case. "[T]he Commerce Clause circumscribes a State's ability to prefer its own citizens in the utilization of natural resources found within its borders, *but destined for interstate commerce!*" *Hicklin,* 437 U.S. at 533, 98 S.Ct. at 2491 (emphasis added).

The Court has also held that state laws which ban the export from the state of fish taken instate, and state laws which ban the import of fish taken out of state, at least implicate the Commerce Clause. *Hughes v. Oklahoma,* 441 U.S. 322, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979) (export, struck down); *Maine v. Taylor,* 477 U.S. 131, 106 S.Ct. 2440, 91 L.Ed.2d 110 (1986) (import, upheld). Despite its broad dictum in Douglas, the court in *Hughes* quoted with approval from Justice Field's dissent in *Geer v. Connecticut,* 161 U.S. 519, 538, 16 S.Ct. 600, 608, 40 L.Ed. 793 (1896) (Field, J., dissenting): "[w]hen any animal ... is lawfully killed for purposes of food or other uses of man, it becomes an article of commerce, and its use cannot be limited to the citizens of one State to the exclusion of citizens of another State." *Hughes,* 441 U.S. at 329, 99 S.Ct. at 1732.

available nondiscriminatory means." *Taylor*, 477 U.S. at 138, 106 S.Ct. at 2447, *quoting Hughes*, 441 U.S. at 336, 99 S.Ct. at 1736.[5]

The superior court, in granting summary judgment in favor of the state, adopted the reasoning of *Salorio v. Glaser*, 82 N.J. 482, 414 A.2d 943, *cert. denied*, 449 U.S. 874, 101 S.Ct. 215, 66 L.Ed.2d 94, *app. dism.*, 449 U.S. 804, 101 S.Ct. 49, 66 L.Ed.2d 7 (1980). In *Salorio*, New Jersey sought to impose an "Emergency Transportation Tax" (ETT) on nonresidents who used the state highway system. *Salorio*, 414 A.2d at 945. The *Salorio* court interpreted *Toomer* and *Mullaney* to permit a state to "impose upon nonresidents the additional expenses occasioned by their activities within the state, or the reasonable costs of benefits which they receive from the state." *Salorio*, 414 A.2d at 953. "[T]he State may exact from [nonresidents] a fair share of the cost of adequate transportation facilities without violating the Privileges and Immunities Clause." *Id.* 414 A.2d at 954.

We believe that the superior court erred in adopting *Salorio*. In our view, its focus is misplaced. Implicit in *Salorio* is the notion that it is permissible to require nonresidents to pay up to 100% of their *pro rata* share of expenditures regardless of what percentage of their *pro rata* share residents are in fact paying. In other words, *Salorio*, as applied to this case, seems to add up to a general proposition that the state may subsidize its own residents in the pursuit of their business activities and not similarly situated nonresidents, even though this results in substantial inequality of treatment. Such a principle seems economically indistinguishable

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[5] *Taylor* seems to squarely put the burden of justification on the state, whereas Privileges and Immunities Clause cases (as discussed *supra*) have been inconsistent on this issue. It would be anomalous, however, to conclude that a law facially discriminating against interstate commerce could pass muster under the Privileges and Immunities Clause yet fail under the Commerce Clause; both clauses have a common origin in the fourth article of the Articles of Confederation. *Baldwin*, 436 U.S. at 379, 98 S.Ct. at 1858.

from imposing a facially equal tax on residents and nonresidents while making it effectively unequal by a system of credits and exemptions. Such schemes have been struck down by the United States Supreme Court. *Austin, supra*; *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 40 S.Ct. 228, 64 L.Ed. 460 (1920). *See also Williams v. Zobel*, 619 P.2d 422, 429-30 & 436-37 (Alaska 1980) (Rabinowitz, C.J., concurring).

The proper focus in our view is on whether residents and similarly situated nonresidents are being treated with substantial equality. The appropriate inquiry is thus whether all fees and taxes which must be paid to the state by a nonresident to enjoy the state-provided benefit are substantially equal to those which must be paid by similarly situated residents when the residents' *pro rata* shares of state revenues to which nonresidents make no contribution are taken into account.

The language of *Toomer* to the effect that it would be permissible "to charge nonresidents a differential which would merely compensate the state . . . for any conservation expenditures from taxes which only residents pay" requires additional discussion. We read this statement to mean that if nonresident fishermen paid the same taxes as Alaskans and these taxes were substantially the sole revenue source for the state out of which conservation expenditures were made, then differential fees would not be permissible. That, however, is not the case in Alaska where a very high proportion of total state revenues are derived from petroleum production. For example, in fiscal year 1986, 86 percent of state revenues were so derived. *Trustees for Alaska v. State*, 795 P.2d 805-810 (Alaska 1990). Thus, in 1986, it would be correct to say that eighty-six cents of each dollar spent for conservation came from state revenue sources to which nonresident fishermen made no contribution. These revenues could have been used to benefit residents through various other programs and they are, analytically, equivalent to "taxes which only residents pay."

The point of *Toomer*, thus, is that the state may equalize the economic burden of fisheries management; where residents pay

proportionately more by way of foregone benefits than nonresidents for fisheries management, nonresidents may be charged higher fees to make up the difference. On this record we are unable to determine whether the higher fees charged nonresidents are excessive for this purpose. Thus, we are unable to say whether there is "a fairly precise fit between remedy and classification." *Taylor v. Conta,* 316 N.W.2d at 823 n. 17. The burden is on the state to make this showing.

We reverse the superior court's determination of this issue and remand for further proceedings consistent with this opinion.

B. THE 3:1 FEE DIFFERENTIAL WAS AUTHORIZED BY STATUTE PRIOR TO THE EFFECTIVE DATE OF THE 1982 AMENDMENTS TO AS 16.43.160(b) (1/1/83)

We now address the class' contention that the 3:1 fee ratio was not authorized by statute prior to 1983. Alaska Statute 16.43.110(a), beginning in 1973 and continuing to the present day, provides that the CFEC "may adopt regulations, consistent with law, necessary or proper in the exercise of its powers or for the performance of its duties under this chapter." Ch. 79, § 1, SLA 1973. Former AS 16.43.160(a) mandated that "[t]he [CFEC] *shall* establish annual fees for the issuance and annual renewal of entry permits or interim use permits." (Emphasis added). The language limiting the CFEC's fees to "reflect the cost of administering this chapter" was removed by the 1977 amendments, along with an increase in the maximum fee from $100 to $750 and abolishment of gear licenses. Ch. 105, § 15, SLA 1977.

The analysis of this issue is governed by *Johns v. Commercial Fisheries Entry Commission*, 758 P.2d 1256 (Alaska 1988). Examining the validity of CFEC regulations is a three step process: we determine "'whether the legislature delegated rule-making authority to the [CFEC], whether the [CFEC] followed the Administrative Procedure Act in promulgating this regulation, and whether the regulation is consistent with and reasonably

necessary to implement the statutes authorizing its adoption.' " *Johns*, 758 P.2d at 1260, *quoting Chevron USA Inc. v. LeResche*, 663 P.2d 923, 927 (Alaska 1983). No one contends that the differential fee structure was not promulgated in accordance with the APA.

This court recognized in *Johns* that AS 16.43.110(a) is a broad delegation of power to the CFEC to adopt regulations "necessary or proper" to implement the purposes of the Act. *Johns*, 758 P.2d at 1256; *see also Kalmakoff v. State, Commercial Fisheries Entry Comm'n*, 693 P.2d 844, 853 (Alaska 1985). The purpose of the Limited Entry Act is "to promote the conservation and the sustained yield management of Alaska's fishery resource and the economic health and stability of commercial fishing in Alaska by regulating and controlling entry into the commercial fisheries in the public interest and without unjust discrimination." AS 16.43.010(a). Thus, if the 3:1 ratio regulation was a necessary or proper implementation of these purposes, it was authorized.

We conclude that this regulation was a proper implementation of the purposes of the Act. Conservation and sustained yield management are not free. What evidence of legislative intent there is from the 1977 amendments to the Act shows that Limited Entry Act fees were intended to substitute for the previous differential gear license fees as the means of ensuring nonresident contribution toward the cost. The maximum amount chargeable was raised from $100 to $750. Ch. 105, § 15, SLA 1977. The clause seemingly limiting the level of fee collection to CFEC expenditures alone was abolished. Ch. 105, § 15, SLA 1977. The executive branch also apparently believed that was the purpose of the amendment. We therefore reject the class' contention.[6]

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[6] The class appears to argue that AS 16.43.160(a) is a dedication of state taxes or licenses to a special purpose in contravention of Article IX, § 7 and an improper delegation of taxing power under Article X, § 2 of the Alaska Constitution.

The "special dedication" argument is frivolous. On the face of AS

C. IS THE CLASS ENTITLED TO A REFUND SHOULD THEY PREVAIL ON REMAND?

The class also appeals the superior court's ruling that its members would not be entitled to a refund should they prevail on their constitutional claims. Since we are remanding the superior court's determination of the constitutional issues, we will address the issue of refund availability.

Alaska Statute 43.15.010(a) provides:

> The Department of Administration shall, with the approval of the attorney general and the Department of Revenue, refund to a taxpayer the amount of a tax paid to the Department of Revenue under protest and deposited in the treasury if (1) the taxpayer recovers judgment against the Department of Revenue for the return of the tax, or (2) in the absence of a judgment, it is obvious to the Department of Revenue that the taxpayer would obtain judgment if legal proceedings were prosecuted by the taxpayer.

We recently considered the scope and effect of this statute in *Principal Mutual Life Ins. Co. v. State, Division of Insurance,* 780 P.2d 1023 (Alaska 1989). Although we declined to defini-

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16.43.160(a), all funds collected from license fees are paid directly into the general fund. *Compare State v. Alex,* 646 P.2d 203, 207-11 (1982) ("earmarked" funds). The Article X, § 2 argument is equally meritless. The class argues that if we construe AS 16.43.160(a) to authorize the collection of fees by the CFEC in an amount greater than is necessary to fund the CFEC's issuance of licenses, this would give rise to an unconstitutional delegation of taxing power. Article X, § 2 simply has nothing to do with this case. It provides that "[a]ll local government powers shall be vested in cities and boroughs. The State may delegate taxing powers to organized cities and boroughs only." This is a limitation intended to simplify the structure of local government; nothing in this suggests any limitation on the state's ability to create a *state* agency and authorize it to set license levels. *Compare Alex,* 646 P.2d at 211-13.

tively resolve the question of whether AS 43.15.010(a) foreclosed a common law action in assumpsit for taxes wrongfully assessed and paid, we clearly held that both under the statute and common law, the taxpayer must formally "protest the payment of the tax at the time of payment in order to subsequently maintain" either a common law or statutory cause of action. *Principal Mutual*, 780 P.2d at 1028-30.

In *Pacific American Fisheries, Inc. v. Mullaney*, 13 Alaska 729, 105 F.Supp. 907, 909 (1952), the district court considered whether the excess fishing license fees collected under Alaska's previous 10:1 fee scheme, struck down in *Mullaney v. Anderson*, could be refunded under § 48-7-1, ACLA 1949, recodified into the current tax refund statute as AS 43.15.010. *See Principal Mutual*, 780 P.2d at 1028 n. 17. The district court held that the differential gear license fee was a tax within the meaning of the refund statute. *Pacific American Fisheries*, 105 F.Supp. at 908-09. The holding of *Pacific American Fisheries* finds continued support in the title of AS 43.15, "Refunds of Taxes and Licenses." *See also* AS 43.15.010(c) (providing for the refund of "license taxes" where a licensee is "prevented from using the license by court order. . . .") Thus, in the abstract, the class might avail itself of this statute to recover any unconstitutionally extracted fees.

However, the class seems to concede in its brief that the necessary protests were not made, instead presenting argument that the requirement of a protest was waived. The protest requirement may be waived by the taxing authority. *Principal Mutual*, 780 P.2d at 1029. On remand, the court should conduct appropriate inquiry into this issue.

We also note that the superior court has been operating under the assumption that a six-year statute of limitations applies to the class' sought after refund. However, there is a specific statute of limitations applicable to claims for tax refunds. Alaska Statute 43.05.275 provides that:

> *a claim for credit* or *refund of a tax under this title for which a taxpayer is required to file a return* or *pay a tax may be filed*

> *by the taxpayer* (1) before the later of (A) three years from the time the return was filed; or (B) two years from the time the tax was paid; or (2) *within two years from the time the tax was paid, if no return was filed.*

(Emphasis added). On remand, assuming that the class overcomes the hurdle of failing to protest payment, it is limited by this two year statute of limitations.

III. CONCLUSION

The judgment of the superior court is AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings consistent with this opinion.

APPENDIX

Year	Total No. of Permits	Number of Permits Held by Non-Res.	% Held
1979:	26,716	4,884	18%
1980:	29,432	5,548	19%
1981:	28,312	5,039	18%
1982:	29.021	5,181	18%
1983:	24,450	4,608	19%
1984:	29,322	4,718	16%

Total Costs of Enforcement & Conservation (in Thous.)	Fair Share of Non-Res. (Total Costs x %) (in Thous.)	Amount Paid by Non.-Res. (In Thous.)	% Paid
18,151.7	3,267.3	1,492.2	8.22%
17,901.2	3,401.2	1.240.4	6.93%
23,316.1	4,196.9	1,465.1	6.28%
28,986.5	5,217.6	1,397.8	4.82%
30,999.0	5,889.8	1,335.6	4.31%
34,023.2	5,443.7	1,381.3	4.06%

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA THIRD JUDICIAL DISTRICT AT ANCHORAGE

DONALD H. CARLSON, WARREN HART, GERARD HASKINS, STEPHEN R. LIBBY, EARL WEESE, and LYLA C. WEESE, Individually and as Class Representatives on Behalf of All Persons Similarly Situated, Plaintiffs,	)	
vs.	)	Case No. 3AN-84-5790 Civil
STATE OF ALASKA, COMMERCIAL FISHERIES ENTRY COMMISSION, Defendant.	)	

FINAL ORDER

For the reasons set forth at the oral argument held on the Plaintiff's Second Motion for Summary Judgment on February 3, 1989,

IT IS ORDERED that summary judgment is granted to Defendant State of Alaska on all remaining claims and issues.

DATED this 21st day of February 1989.

/s/ Karen L. Hunt
Karen L. Hunt
Superior Court Judge

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

CONSTITUTIONAL PROVISIONS

Article I, § 8 of the United States Constitution provides in pertinent part as follows:

> The Congress shall have Power . . . To Regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . .

Article IV, § 2 of the United States Constitution provides:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several

ALASKA STATUTES

Title 16: Fish and Game

Sec. 16.05.480. Commercial fishing license. (a) A person engaged in commercial fishing shall obtain a commercial fishing license. The fee for the license is $30 for residents, and $90 for nonresidents. Except for those which are also entry or interim-use permits, all commercial fishing licenses are nontransferable. The commercial fishing license shall be retained in the possession of the licensee, readily accessible for inspection at all times. No more than one fee may be charged annually against a person. For the purposes of this section, "commercial fishing license" includes entry permits and interim-use permits issued under AS 16.43 and crewmember fishing licenses.

(b) A person applying for a resident commercial license under this section shall provide the proof of residence that the department requires by regulation.

(c) [*Repealed § 12 ch 123 SLA 1978.*] (§ 6 art III ch 94 SLA 1959; am § 19 ch 131 SLA 1960; am § 1 ch 93 SLA 1966; am § 2 ch 42 SLA 1968; am § 8 ch 105 SLA 1977; am §§ 1, 2, 12

ch 123 SLA 1978; am § 1 ch 79 SLA 1982)

Sec. 16.43.160. Fees. (a) The commission shall establish annual fees for the issuance and annual renewal of entry permits or interim-use permits. The amount paid by a permit holder under the provisions of AS 16.05.480 shall be credited by the commission toward payment of the fee charged under this section. No more than one credit may be obtained annually by a person.

(b) Annual fees established under this section shall be no less than $10 and no more than $750 and shall reasonably reflect the different rates of economic return for different fisheries. The amount of an annual fee for a nonresident shall be three times the amount of the annual fee for a resident.

(c) The resident holder of an entry permit or interim-use permit who has a family income falling within the federal poverty guidelines, adjusted by the commission to reflect appropriate cost-of-living differentials, is subject to a maximum annual fee of $15.

(d) The commission may charge interest at a rate not to exceed the legal rate of interest established in AS 45.45.010 on fees more than 60 days overdue. (§ 1 ch 79 SLA 1973; am § 15 ch 105 SLA 1977; am § 4 ch 123 SLA 1978; am § 2 ch 79 SLA 1982; am §§ 3, 4 ch 22 SLA 1985)

ALASKA ADMINISTRATIVE CODE

20 AAC 05.240. SCHEDULE OF ANNUAL FEES. (a) The annual fee for the issuance or renewal of an entry permit or interim-use permit is determined by the commission on a yearly basis according to the following:

(1) The resident annual fee for the issuance or renewal of an entry permit or interim-use permit in a limited fishery is .25 percent of the estimated value of the entry permit, rounded to the nearest fee class amount established in (4) of this subsection. The non-resident annual fee is three times this amount, as set out in (4) of this subsection. If insufficient data are available to determine the estimated value of an entry permit, the annual fee in a limited fishery will be calculated according to (2) or (3) of the subsection.

(2) The resident annual fee for the issuance or renewal of

an interim-use permit in an unlimited fishery is .25 percent of the estimated average gross earnings per permit in the most recent three years for which data are available, rounded to the nearest fee class amount established in (4) of this subsection. The non-resident fee is three times this amount, as set out in (4) of this subsection.

(3) Notwithstanding (2) of this subsection, the commission will, in its discretion, make an appropriate adjustment to a fee if more than one permit type allows the directed harvest of the same species with the same gear in the same area. If strict application of (1) and (2) of this subsection results in a fee that exceeds the level appropriate in light of the rate of economic return for the fisheries covered by that permit, the commission will, in its discretion, reduce the fee.

(4) The resident and non-resident annual fees are:

FEE CLASS	ANNUAL FEE	
	Resident	Non-Resident
I	$ 250	$ 750
II	200	600
III	150	450
IV	100	300
V	50	150

(5) Under (1) of this subsection, the entry permit value for each fishery will be estimated by the commission in the spring of the year immediately preceding the year for which the annual fee applies.

(6) Under (2) and (3) of this subsection, the average gross earnings for each fishery will be estimated by the commission in the spring of the year immediately preceding the year for which the annual fee applies. These estimates will be based upon the most recent three years for which data are available. If less than three years of data are available for a fishery, the average will be calculated using the available years.

(b) Unless fishery resources, gear, or administrative areas are combined under this chapter, and except as provided in 20 AAC 05.120, a separate permit is required for each separate

fishery resource, gear, and administrative area.

(c) For the purpose of assessing the fees for the application for, or renewal of, entry and interim-use permits, a "resident" is

(1) repealed 11/26/87.

(2) one who, on the date of the permit application or renewal, and throughout the 12-month period before that date

(A) except for brief intervals, military service, attendance at an educational or training institution, or absence for good cause is, and was, physically present in the state with the intent to remain in the state indefinitely and to make a home in the state; and

(B) neither claimed nor received benefits as a resident of another state, territory or country.

(d) For the purposes of this chapter, criteria relevant to a determination of residence include, but are not limited to

(1) where an individual is registered to vote;

(2) where an individual claims residence on his income tax returns;

(3) where an individual registers or licenses his personal property, including but not limited to cars, boats, trucks and trailers;

(4) by which the state the individual is licensed to drive;

(5) in which state the individual maintains bank accounts, savings accounts, lines of credit, and other such financial relationships; and

(6) in which state the individual maintains a permanent place of abode.

(e) Alaska residents may apply for a reduced fee of $15 for the issuance of an interim-use permit or the annual renewal of an interim-use or entry permit if their total family income falls within the poverty guidelines for the Legal Services Corporation, as set out in Appendix A to 45 Code of Federal Regulations Section 1611, and as modified by Alaska regional cost-of-living differentials. A commission publication entitled "CFEC Map/Cost of

Living Differentials" contains maps designating the regions and charts showing regional cost-of-living differentials, and is incorporated in this section by reference. (EFF. 12/27/79, Register 72; am 1/2/81, Register 77; am 3/4/81, Register 78; am 1/29/82, Register 81; am 10/30/82, Register 84; am 12/30/82, Register 84; am 10/28/84, Register 92; am 12/29/84, Register 92; am 4/13/85, Register 94; am 9/26/85, Register 95; am 11/22/87, Register 104; am 11/26/87, Register 104; am 1/17/91, Register 117)

Supreme Court, U.S.
FILED
DEC 12 1996
CLERK

(2)

No. 96-685

In The

Supreme Court of the United States

October Term, 1996

DONALD H. CARLSON, WARREN HART, GERARD HASKINS, STEPHEN R. LIBBY, EARL WEESE, and LYLA C. WEESE, individually and as Class Representatives on behalf of all persons similarly situated,

Petitioners,

v.

STATE OF ALASKA, COMMERCIAL FISHERIES ENTRY COMMISSION,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Alaska

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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62 pp

QUESTIONS PRESENTED

1. Whether the Alaska Supreme Court erred by reviewing Alaska's commercial fishing license and permit fee differentials, which are predicated on residency, under the Privileges and Immunities Clause instead of under the Commerce Clause.

2. When a state imposes fees for a state-provided service, whether the compensatory tax doctrine prohibits the state from attributing to its residents taxes which they pay for that service.

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STATEMENT OF FACTS AND PROCEEDINGS BELOW

Alaska charges nonresident commercial fishers three times more for annual fishing licenses and annual limited entry permits than it charges resident commercial fishers.[1] These fees are intended to compensate the state for a portion of what it spends to manage its commercial fisheries.[2] Generally, the fees are a small fraction of the income derived from those fisheries.[3] In recent years,

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[1] For a commercial fishing license, a resident pays $30 per year and a nonresident pays $90 – a license fee differential of $60. Alaska Statute 16.05.480. App. 1a. For the annual fee for a limited entry permit, which varies according to the value of the particular fishery, a nonresident pays from $100 to $500 more each year than a resident. Alaska Statute 16.43.160; 20 Alaska Administrative Code § 05.240. App. 1a-6a.

[2] There is no evidence that the fee differentials are intended to discourage, or that they actually discourage nonresidents from participating in Alaska commercial fisheries. Petitioners are incorrect in saying "Alaska has essentially admitted that the overall purpose of the permit system is to keep non-residents out of Alaska's fisheries." Petition at 5. To support that claim, they quote a passage from report on the state's limited entry program, a program that limits the number of persons who can participate in Alaska's high value fisheries. Despite the implication of the passage, participation in those fisheries, although limited in number, does not favor residents over nonresidents. Anyone may participate after purchasing or being issued a limited entry permit.

Distinct from limited entry permits are the fees that permit holders must pay each year to the state. Those annual fees, three times higher for nonresidents than residents, are what petitioners are challenging. Thus, they have quoted language from a report that has no bearing on the annual fees.

[3] For example, a high value fishery having a $60 license differential and a $500 permit differential had average gross

nonresident participation in Alaska commercial fisheries has been increasing. App. 10a n.5.

In 1984, the petitioners filed a class action challenging Alaska's fee differentials. App. 8a. Among other allegations, the petitioners claimed that the differentials violate two clauses of the United States Constitution – the Privileges and Immunities Clause[4] and the Commerce Clause.[5] App. 9a. When the trial court ruled in the state's favor, the petitioners appealed to the Alaska Supreme Court. App. 12a-13a.

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earnings per permit that ranged, for the years 1983 through 1993, between $88,709 and $268,525. For the same years, a low value fishery having a $60 license differential and a $100 permit differential had average gross earnings per permit between $847 and $1613. App. 9a n.4. If license and permit fees are considered "user fees" for participating in Alaska's commercial fisheries, then the annual return on nonresidents' fees ranged between 956% and 3073% for the high value fishery and between 253% and 572% for the low value fishery. Of course, there are other fixed annual costs of commercial fishing – debt retirement on permits and vessels, gear costs, and crew shares, to name a few. The point of isolating this one cost is to show that the user fee is insignificant when compared to the benefit derived from participating in the fisheries.

[4] "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2.

[5] "The Congress shall have the Power . . . [t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8. Though phrased as a grant of regulatory power to Congress, the Clause has long been understood to have a "negative" aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce. *Oregon Waste Systems, Inc. v. Department of Envtl. Quality*, 511 U.S. 93 (1994). Petitioners are seeking review under this aspect of the Clause.

In 1990, the supreme court made its first ruling on the differentials. *Carlson v. State*, 798 P.2d 1269 (Alaska 1990). In *Carlson I*, the court held that the proper inquiry under the Privileges and Immunities Clause was whether all the fees and taxes paid to the state by nonresident fishers to participate in Alaska commercial fisheries are substantially equal to those paid by resident commercial fishers. App. 11a. The court said that the inquiry should take into account the residents' proportionate shares of state revenues to which nonresidents make no contribution and that are expanded for commercial fisheries management. *Id.* It also said that state revenues derived from petroleum production are analytically equivalent to taxes which only residents pay. *Id.* The court remanded the case for an accounting of those revenues and for several other inquiries. *Id.* It left open the question of whether this case is governed by the Commerce Clause. *Id.* at 1276-77 n.4. App. 13a n.8.

On remand, the trial court decided that the differentials do not violate the Commerce Clause or the Privileges and Immunities Clause. Again, the petitioners appealed. App. 13a.

In its second review of the fee differentials, *Carlson II*, the Alaska Supreme Court decided that the Commerce Clause was not implicated. *Carlson v. State*, 919 P.2d 1337, 1340-41 (Alaska 1996). This is because the differentials are not predicated on the movement of articles across state lines, but rather, on the residency status of persons applying for the permits and licenses. App. 15a-16a.

Under the Privileges and Immunities Clause, the Alaska Supreme Court decided that the trial court had

applied the incorrect formula for calculating the permissible differentials.[6] It remand the case for application of a different formula. App. 24a.

Under that formula, the permissible difference between a resident's fee and a nonresident's fee is each resident's proportionate share of the state's expenditures for commercial fishery management that are derived from petroleum revenues (in lieu of resident-only taxes).[7] App. 21a. In other words, a permissible nonresident's fee would be equal to the resident's fee *plus* the resident's proportionate share of petroleum revenues which are expended by the state for the management of commercial fisheries.[8]

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[6] The trial court found that in order to calculate the permissible fees, the petroleum revenues that are deposited in the state's general fund and paid out for commercial fisheries management should be divided by the number of resident permits issued in a given year. The supreme court held that the proper divisor is the total number of Alaskans. App. 22a.

[7] Under *Toomer v. Witsell*, 334 U.S. 385 (1948), a state may establish a resident-nonresident fee differential "which would merely compensate the State . . . for any *conservation* expenditures from taxes which only residents pay." *Toomer*, 334 U.S. at 399. (Emphasis added.) Alaska's expenditures that support the commercial fishing industry are greater than just funds spent for "conservation." The state also spends funds for allocating fish among various commercial fisheries, for public works that support the industry, and for commercial fisheries law enforcement. In this brief, all of the state's commercial fishery activities are called "management."

[8] The supreme court expressed it this way: "Resident commercial fishers are paying the license and permit fees they are charged plus their *per capita* share of oil revenues which are diverted to fisheries management from other benefits or State

The petitioners are seeking review of those decisions.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW IS CONSISTENT WITH THIS COURT'S TREATMENT OF DIFFERENTIALS THAT ARE PREDICATED ON RESIDENCY, NOT ON THE MOVEMENT OF ARTICLES ACROSS STATE LINES.

The Alaska Supreme Court's reason for reviewing the fee differentials under the Privileges and Immunities Clause instead of under the Commerce Clause is that this Court " . . . [H]as consistently analyzed statutes which purportedly classify on the basis of residency under the Privileges and Immunities or the Equal Protection Clauses." App. 16a. To support that observation, the Alaska Court cited *Toomer v. Witsell*, 334 U.S. 385 (1948), and four other opinions by this Court. App. 16a n.10.

Petitioners claim that none of those opinions "suggests that discrimination against commercial interests based on residency is not cognizable under the Commerce Clause." Petition, at 13 n.16. While it is true that none of the opinions explicitly hold that, it is also true that this Court reviewed those cases, and has reviewed all other cases where differential treatment is predicated on

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services. It is this quantity which must be equivalent to the fee differential for the fees to be constitutional under the *Carlson I* analysis." App. 23a.

residency, *only* under the Privileges and Immunities Clause.[9]

Petitioners also claim that other opinions hold that differential treatment, predicated on residency, should be reviewed under the Commerce Clause. They have quoted passages which, when removed from their factual contexts, seem to support their proposition.[10] Petition at 14-16.

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[9] *Mullaney v. Anderson*, 342 U.S. 415 (1952), is no exception. Even though the lower court struck down the nonresident fee differential under the Commerce Clause, this Court, following *Toomer*, sustained that result under the Privileges and Immunities Clause, and only under that clause. *Id.* at 430.

[10] For example, petitioners say, "The Commerce Clause is implicated whenever a state seeks 'to prefer its own citizens in the utilization of natural resources found within its borders, but destined for interstate commerce.' " Petition at 15. Their partial quote is from *Hicklin v. Orbeck*, 437 U.S. 517, 533 (1978), an opinion where the Court struck down the "Alaska Hire" law.

Because the "Alaska Hire" law was predicated on residency, the Court applied the Privileges and Immunities Clause. *Id.* at 525-31. The Court went on to discuss the "mutually reinforcing relationship" between that clause and the Commerce Clause, and it stated that several Commerce Clause decisions gave support to its Privileges and Immunities Clause decision. *Id.* at 531-34.

Omitted from the petitioners' partial quote are the Commerce Clause opinions, identified at the beginning of the sentence in the *Hicklin* opinion. Those opinions – identified as "West, Pennsylvania v. West Virginia and Foster Packing," *id.* at 533, – struck down state action that was predicated on the movement of articles across state lines, not on a person's residency. (*West v. Kansas Natural Gas*, 221 U.S. 229 (1911) (Oklahoma law completely prohibited the export of natural gas found within the state.); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); (West Virginia law prohibited the export of natural gas before in-state demands were met.); *Foster Packing Co. v.*

But when the contexts are considered, all of those cases have a common feature that is absent from this one. All of them involve differential treatment that is predicated on the movement of articles across state lines. None of them have the pertinent feature of this case. None involve differential treatment that is predicated on a person's residency.[11]

Haydel, 278 U.S. 1 (1928) (Louisiana law required local processing before shrimp harvested in Louisiana could be exported.) Thus, the opinions contradict rather than support the petitioners' proposition.

[11] The Commerce Clause opinions cited by the petitioners are: *Brown v. Maryland*, 25 U.S. (12 Wheat) 419 (1827) (Maryland's tax predicated on a person importing merchandise from another state.); *Walling v. Michigan*, 116 U.S. 446 (1884) (Michigan's tax predicated on importing liquor from another state.); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977) (North Carolina's prohibition predicated on importing or selling apples bearing another state's grading label.); *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984) (West Virginia's gross receipts tax predicated on whether a taxpayer conducted manufacturing in West Virginia.); *New Energy Co. v. Limbach*, 486 U.S. 269 (1980) (Ohio's tax credit predicated on whether ethanol was produced in Ohio or produced in a state giving similar advantage to Ohio ethanol.); *Philadelphia v. N.J.*, 437 U.S. 617 (1978) (New Jersey's prohibition predicated on whether waste originated outside of New Jersey.); *Halliburton Oil Well Cementing Co. v. Reilly*, 373 U.S. 64 (1963) (Louisiana's use and sales taxes were predicated on whether the performance of certain services or the purchase of certain items occurred within Louisiana.); *Freeman v. Hewit*, 329 U.S. 249 (1946) (Indiana gross income tax predicated on the interstate sale of securities.); *Oregon Waste Systems v. Department of Envtl. Quality*, 511 U.S. 93 (1994) (Oregon's surcharge predicated on whether the solid waste was generated outside of Oregon.) In none of these Commerce Clause cases was a person's residency the predicating factor for differential treatment.

The petitioners claim that the Alaska Supreme Court's second reason for not reviewing the differentials under the Commerce Clause is because the court decided that "articles" had not yet entered the stream of commerce. Although the petitioners do not identify the "articles" here that trigger Commerce Clause analysis,[12] they discuss several opinions holding that the Clause applies to taxation on "local activities," that is, on articles that are destined to enter the stream of commerce even before they are harvested. Petition at 16-19.

The petitioners, however, have mischaracterized the supreme court's reason. The court reasoned that the fee differentials are predicated on residency, not on the movement of articles across state lines. App. 15a-16a. The court said nothing about *when* an article, which eventually enters the stream of commerce, qualifies for analysis

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[12] The fish caught by commercial fishers cannot be the "articles" that qualify for analysis under the Commerce Clause; Alaska's fee differentials do not treat fish differently because they are shipped in interstate commerce. The same is true of the fishers themselves.

For this case to resemble other cases analyzed under the Commerce Clause, Alaska's differentials would have to be predicated on something crossing Alaska's borders. (A state discriminates against interstate commerce if it "tax[es] a transaction or incident more heavily *when it crosses state lines* than when it occurs entirely within the State." *Armco Inc. v. Hardesty*, 467 U.S. 638, 642 (1984), (emphasis added.) If Alaska were to impose a head tax or some other burden on all incoming fishers, including residents, that is predicated on their travel from a point outside of the state, this case would warrant review under the Commerce Clause. However, the fee differentials do not target interstate commerce in that manner.

under the Clause.[13] The petitioners' arguments about "local activities" are misdirected.

II. THE DECISION BELOW IS CONSISTENT WITH THIS COURT'S HOLDING UNDER THE PRIVILEGES AND IMMUNITIES CLAUSE THAT A STATE, WHEN IMPOSING FEES FOR A STATE-PROVIDED SERVICE, MAY ATTRIBUTE TO ITS RESIDENTS TAXES THEY PAY FOR THAT SERVICE. RECENT DECISIONS UNDER THE COMPENSATORY TAX DOCTRINE DO NOT DIMINISH THAT HOLDING

The Alaska Supreme Court remanded this case to apply a formula under the Privileges and Immunities Clause for analyzing the fee differentials. That formula will credit resident commercial fishers with their proportionate share of state expenditures for commercial fishery management that are derived from taxes which only residents pay. Thus, the formula follows *Toomer*'s holding that a state may "charge non-residents a differential which would merely compensate the State . . . for any conservation expenditures from taxes which only residents pay." *Toomer* at 398, 399. For simplicity, this will be called the "tax attribution doctrine."

Both *Toomer* and the Alaska Supreme Court recognize that when the state assesses fees for a service, attributing

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[13] The Alaska Supreme Court, in its first decision in this case, acknowledged that later opinions by this Court conflict with the proposition that unharvested fish do not implicate the Commerce Clause. *Carlson I*, 798 P.2d 1269, 1276 f.4 (Alaska 1990). It would be incongruous for the Alaska Supreme Court, in its second decision, to rely on that proposition.

to residents their proportionate share of state taxes they have paid for that service is necessary for treating residents and nonresidents "on terms of substantial equality."[14] Were residents and nonresidents charged identical fees, the residents, when their proportionate tax payments for the same services are taken into account, would be paying *more* than nonresidents for those services. In essence, the residents would be overcharged by the amount that their taxes pay for that service.

Despite this reality, the petitioners claim that the Alaska Supreme Court erred in applying tax attribution doctrine. They imply that *Toomer* has been overruled. Petition at 11, 21. They argue that the Court's recent treatment of the compensatory tax doctrine under the Commerce Clause prevents Alaska from attributing resident taxes under the Privileges and Immunities Clause. Petition at 21-23.

The petitioners are incorrect when saying that the tax attribution doctrine is "antiquated" and "long since discredited." Petition at 12. *Toomer* made rulings on both the Privileges and Immunities Clause and the Commerce Clause. Under the Privileges and Immunities Clause, it struck down South Carolina's 100:1 nonresident fee differential and, in doing so, established the tax attribution doctrine: a state may "charge non-residents a differential which would merely compensate the State . . . for any conservation expenditures from taxes which only residents pay." *Toomer*, 334 U.S. at 398, 399. That holding is what the Alaska Supreme Court followed, and it has

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[14] *Toomer*, 334 U.S. at 396.

never been rejected, either explicitly or implicitly, by this Court.[15]

The petitioners are correct when, probably referring to nonresident fee differentials, they say "no decision of this Court has ever upheld such discrimination, or discrimination based on a theory of foregone revenues. . . ." Petition at 21. But that is true only because this Court has not taken up those differentials since *Mullaney*. A more relevant statement would be that no decision of this Court *has ever rejected* the tax attribution doctrine since it was announced in *Toomer*. It is still "good law," and well it should be. Without the doctrine, there could be no "substantial equality" between residents and nonresidents when their fees pay for only a portion of a state-provided service and the residents' taxes pay for the rest.

Petitioners argue that decisions about the compensatory tax doctrine under the Commerce Clause should be

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[15] Perhaps petitioners, when they say "antiquated" and "discredited," are referring the *Commerce Clause* rulings of *Toomer*. Under that Clause, the Court reviewed the 1/8 cent per pound tax that South Carolina assessed on green shrimp taken in the maritime zone, *Toomer*, 334 U.S. at 394, and it reviewed the requirement that shrimpers unload, pack, and stamp their catch at a South Carolina port before shipping it to another state, *id.* at 403. The Court said that the South Carolina tax did not violate the Commerce Clause because "the taxable event, the taking of shrimp, occurs before the shrimp can be said to have entered the flow of interstate commerce." *Id.* at 394, 395. Later opinions suggest that the Clause may be implicated before fish, destined for interstate commerce, are harvested. See Petition at 16-19. Even so, *dicta* under the Commerce Clause does not affect *Toomer's* holding under the Privileges and Immunities Clause creating the tax attribution doctrine.

the basis for overruling the tax attribution doctrine under the Privileges and Immunities Clause. Essentially, they argue that the two doctrines are interchangeable, and they imply that this Court, in recent decisions, has rejected the compensatory tax doctrine. Petition at 21-23.

Although the Commerce Clause and the Privileges and Immunities Clause share a common origin and have similar analyses,[16] the clauses address entirely different types of discrimination: discrimination against articles traveling across state lines versus discrimination against nonresidents pursuing a livelihood or other important interest.

Likewise, the two doctrines involve different inquiries. Under the compensatory tax doctrine, a state, to justify a tax on interstate commerce, must identify an offsetting *tax imposed on intrastate commerce*. Under the tax attribution doctrine, a state, to justify higher fees against nonresidents, must identify offsetting *fees paid by residents through the taxes they pay for that state-provided service*. The inquiries are not interchangeable.

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[16] Both Clauses have their origin in the Fourth Article of the Articles of Confederation. *Hicklin*, 437 U.S. at 531-32. Under the Commerce Clause, a state may discriminate against interstate commerce if there is a legitimate state interest that cannot be achieved by other, nondiscriminatory means. *Maine v. Taylor*, 477 U.S. 131, 138 (1986). Under the Privileges and Immunities Clause, a state may discriminate against nonresidents if there is a valid reason, independent of the mere fact that they are nonresidents, and if the degree of discrimination bears a close relation to the reason. *Toomer*, 334 U.S. at 396. Thus, under both analyses, discrimination is prohibited unless the state has a legitimate purpose or reason and if it satisfies other conditions.

In recent years, states have had difficulty when trying to rely on the compensatory tax doctrine. Principally, they have been unable to satisfy the third prong of the doctrine which requires that the interstate tax and the compensatory intrastate tax be assessed against "substantially equivalent events."[17] But because states have failed to meet this prong does not mean that the Court has rejected the doctrine, or as petitioners imply, rejected its rationale. Although the Court has not recently employed

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[17] To rely on the compensatory tax doctrine, a state must show three things: (1) the intrastate tax for which the state is intended to compensate; (2) that the interstate tax must roughly approximate – but not exceed – the intrastate tax; and (3) that the events on which the intrastate and interstate taxes are imposed are "substantially equivalent," that is, are sufficiently similar in substance to serve as mutually exclusive proxies of each other. *Oregon Waste Systems*, 114 S.Ct. at 1352, 128 L.Ed.2d at 24.

Recently, states have had difficulty satisfying the third prong. For example, see *Maryland v. Louisiana*, 451 U.S. 725 (1981) (Severance and first use or processing were not "substantially equivalent events" on which compensating taxes might be imposed. *Id.* at 759.); *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984) ("Here, too, manufacturing and wholesaling are not 'substantially equivalent events' such that the heavy tax on in-state manufacturers can be said to compensate for the admittedly lighter burden placed on wholesalers from out of State." *Id.* at 463.); *Oregon Waste Systems, Inc. v. Department of Envtl. Quality*, 511 U.S. 93, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994) ("We conclude that, far from being substantially equivalent, taxes on earning income and utilizing Oregon landfills are 'entirely different kind[s] of tax[es].' " *Id.*, 114 S.Ct. at 1353, 128 L.Ed.2d at 25. *Fulton Corp. v. Faulkner*, 116 S.Ct. 848 (1996) ("Even assuming the truth of both these assertions, however, we find that the intangibles tax is not functionally equivalent to the corporate income tax." *Id.* at 858.).

the doctrine outside of the context of sales and use taxes (*see Oregon Waste Systems*, 114 S.Ct. at 1353, 128 L.Ed.2d at 25), the doctrine is still viable.

To be sure, the Court has discussed the practical difficulty of identifying compensatory intrastate taxes "in various other means of general taxation, such as income taxes. . . . " *Id.* Such an inquiry may show that some residents who pay the state's general taxes are also paying the interstate taxes. For them, the taxes are cumulative, not compensatory. *See id.*

The difficulty of fitting general state taxes into the compensatory tax doctrine, however, does not mean that they should be stricken from the tax attribution doctrine. Indeed, the latter is grounded on the principle that the residents' payments for the state-provided service *through their general taxes* is the permissible ground for charging the residents a lower fee. If residents' general taxes cannot be considered, the attributing tax doctrine dissolves.

There are other reasons for not transferring the compensatory tax doctrine, or its difficulties, to the attributing tax doctrine. As pointed out earlier, their inquiries are incongruous. It is futile to search for a compensatory interstate tax when the differential treatment is predicated on residency, not on articles moving across state borders.

With residency as the predicating factor, courts do not have to "plunge . . . into the morass of weighing comparative tax burdens by comparing taxes on dissimilar events." *Id.* There are no "events" to analyze. Unlike the income tax at issue in *Oregon Waste Systems*, which

was borne partially by interstate commerce, here the nonresidents pay nothing beyond their fees toward the state's costs of fisheries management.

The Alaska Supreme Court's Privileges and Immunities Clause analysis is straight forward. First, the state must identify its "conservation expenditures from taxes which only residents pay." *Toomer*, 334 U.S. at 399. Because Alaska residents pay no general income tax and most of the state's expenditures come from petroleum revenues, those revenues are "analytically equivalent to 'taxes which only residents pay'." App. 11a. Then, the state will have to divide the petroleum revenues that pay for its commercial fisheries management by the number of Alaska residents. The resulting quotient can be attributed to each Alaska commercial fisher. It is the difference that the state can charge between that fisher's fee and a nonresident fisher's fee for the same license or permit. There is no "morass" of taxable "events" that complicate the analysis.

A permit or license is needed to participate in Alaska's commercial fishing industry. Alaska provides management services to that industry. A permissible fee differential is based on Alaska's expenditures for that industry. Thus, Alaska's fees resemble "user fees."[18]

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[18] Under the Commerce Clause, the Court distinguishes "user fees" from "compensatory taxes." A "user fee" is a "specific charge imposed by the State for the use of state-owned or state-provided transportation or other facilities and services." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 621 (1981). *See also Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972); *Clark v. Paul Gray, Inc.*, 306 U.S.

That is another reason to not employ the compensatory tax doctrine. User fees and taxes are not subject to the same analysis as are compensatory taxes.[19] Thus, even if Alaska's fees were reviewable under the Commerce Clause, the compensatory tax doctrine would probably not be part of that review.

CONCLUSION

This Court has applied the Privileges and Immunities Clause to differentials that involve "basic and essential activities,"[20] and are predicated on residency. This Court has never applied the Commerce Clause unless differentials are predicated on the movement of articles across state lines. The Alaska Supreme Court's use of the Privileges and Immunities Clause instead of the Commerce

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583 (1939). It follows that a "compensatory tax" occurs when the transportation, facility, or service is provided by private entities. See *Oregon Waste Systems*, 114 S.Ct. at 1352 n.6.

[19] Regarding user fees and taxes, the Court said "such imposition, although termed a tax, cannot be tested by standards which generally determine the validity of taxes." *Commonwealth Edison*, 453 U.S. at 622 n.12, quoting *Interstate Transit, Inc. v. Lindsey*, 283 U.S. 183, 190 (1931). "Because such charges are purportedly assessed to reimburse the State for costs incurred in providing specific quantifiable services, we have required a showing, based on factual evidence in the record, that 'the fees charged do not appear to be manifestly disproportionate to the services rendered. . . . ' ". *Commonwealth Edison*, 453 U.S. at 622 n.12, quoting *Clark*, 306 U.S. at 599. *See also, Evansville*, 405 U.S. at 716-17.

[20] *Baldwin v. Montana*, 436 U.S. 371, 387 (1978).

Clause when reviewing the resident-nonresident fee differentials is consistent with that precedent.

The tax attribution doctrine, established by *Toomer* under the Privileges and Immunities Clause, is still "good law." Although the Court has not applied the doctrine in recent years, the petitioners can cite to no opinion where it has been rejected.

The tax attribution doctrine is vital for "substantial equality" between residents and nonresidents when they are charged user fees for a state-provided service and the state supplements those fees with tax revenues paid by the residents. If the state could not attribute to a resident his or her proportionate share of those taxes, each resident would be paying that amount more than a nonresident for the same service. States would be disinclined to spend resident-only taxes for a service that benefits nonresidents. They would be inclined to either stop providing the service or to equalize the fees, but raise them high enough to cover the full cost of the service.

Under the tax attribution doctrine, the inquiry looks not to whether there is an intrastate tax to "compensate," but whether resident-paid tax revenues that support state-provided services are substantially equivalent to the additional amount that nonresidents pay through a higher use fee. "Compensatory tax" analysis has no place in that inquiry.

Because the Alaska Supreme Court has followed this Court's rulings under the Privileges and Immunities Clause and under the Commerce Clause, the petition for writ of certiorari should be denied.

Respectfully submitted this 12th day of December 1996.

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APPENDIX

Sec. 16.05.480. Commercial fishing license. (a) A person engaged in commercial fishing shall obtain a commercial fishing license. The fee for the license is $30 for residents, and $90 for nonresidents. Except for those which are also entry or interim-use permits, all commercial fishing licenses are nontransferable. The commercial fishing license shall be retained in the possession of the licensee, readily accessible for inspection at all times. No more than one fee may be charged annually against a person. For the purposes of this section, "commercial fishing license" includes entry permits and interim-use permits issued under AS 16.43 and crewmember fishing licenses.

(b) A person applying for a resident commercial license under this section shall provide the proof of residence that the department requires by regulation.

(c) *[Repealed, § 12 ch 123 SLA 1978.]* (§ 6 art III ch 94 SLA 1959; am § 19 ch 131 SLA 1960; am § 1 ch 93 SLA 1966; am § 2 ch 42 SLA 1968; am § 8 ch 105 SLA 1977; am §§ 1, 2, 12 ch 123 SLA 1978; am § 1 ch 79 SLA 1982)

Sec. 16.43.160. Fees. (a) The commission shall establish annual fees for the issuance and annual renewal of entry permits or interim-use permits. The amount paid by a permit holder under the provisions of AS 16.05.480 shall be credited by the commission toward payment of the fee charged under this section. No more than one credit may be obtained annually by a person.

(b) Annual fees established under this section shall be no less than $10 and no more than $750 and shall reasonably reflect the different rates of economic return for different fisheries. The amount of an annual fee for a nonresident shall be three times the amount of the annual fee for a resident.

(c) The resident holder of an entry permit or interim-use permit who has a family income falling within the federal poverty guidelines, adjusted by the commission to reflect appropriate cost-of-living differentials, is subject to a maximum annual fee of $15.

(d) The commission may charge interest at a rate not to exceed the legal rate of interest established in AS 45.45.010 on fees more than 60 days overdue. (§ 1 ch 79 SLA 1973; am § 15 ch 105 SLA 1977; am § 4 ch 123 SLA 1978; am § 2 ch 79 SLA 1982; am §§ 3, 4 ch 22 SLA 1985)

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20 AAC 05.240. SCHEDULE OF ANNUAL FEES. (a) The annual fee for the issuance or renewal of an entry permit or interim-use permit is determined by the commission on a yearly basis according to the following:

(1) the resident annual fee for the issuance or renewal of an entry permit or interim-use permit in a limited fishery is .25 percent of the estimated value of the entry permit, rounded to the nearest fee class amount established in (4) of this subsection; the nonresident annual fee is three times this amount, as set out in (4) of this subsection; if insufficient data are available to determine the estimated value of an

entry permit, the annual fee in a limited fishery will be calculated according to (2) or (3) of the subsection;

(2) the resident annual fee for the issuance or renewal of an interim-use permit in an unlimited fishery is .25 percent of the estimated average gross earnings per permit in the most recent three years for which data are available, rounded to the nearest fee class amount established in (4) of this subsection; the non-resident fee is three times this amount, as set out in (4) of this subsection;

(3) notwithstanding (2) of this subsection, the commission will, in its discretion, make an appropriate adjustment to a fee if more than one permit type allows the directed harvest of the same species with the same gear in the same area or if one permit allows the directed harvest of the same species by a combination of gears in the same area; if strict application of (1) and (2) of this subsection results in a fee that exceeds the level appropriate in light of the rate of economic return for the fisheries covered by that permit, the commission will, in its discretion, reduce the fee;

(4) the resident and non-resident annual fees are:

FEE CLASS	ANNUAL FEE	
	Resident	**Non-resident**
I	$250	$750
II	200	600
III	150	450
IV	100	300
V	50	150

(5) under (1) of this subsection, the entry permit value for each fishery will be estimated by the

commission in the spring of the year immediately preceding the year for which the annual fee applies;

(6) under (2) and (3) of this subsection, the average gross earnings for each fishery will be estimated by the commission in the spring of the year immediately preceding the year for which the annual fee applies; these estimates will be based upon the most recent three years for which data are available; if less than three years of data are available for a fishery, the average will be calculated using the available years.

(b) Unless fishery resources, gear, or administrative areas are combined under this chapter, and except as provided in 20 AAC 05.120, a separate permit is required for each separate fishery resource, gear, and administrative area.

(c) For the purpose of assessing the fees for the application for, or renewal of, entry and interim-use permits, a "resident" is

(1) repealed 11/26/87;

(2) one who, on the date of permit application or renewal, and throughout the 12-month period before that date

(A) except for brief intervals, military service, attendance at an educational or training institution, or absence for good cause is, and was, physically present in the state with the intent to remain in the state indefinitely and to make a home in the state; and

(B) neither claimed nor received benefits as a resident of another state, territory or country.

(d) For the purposes of this chapter, criteria relevant to a determination of residence include, but are not limited to,

(1) where an individual is registered to vote;

(2) where an individual claims residence on his income tax returns;

(3) where an individual registers or licenses his personal property, including but not limited to cars, boats, trucks and trailers;

(4) by which state the individual is licensed to drive;

(5) in which state the individual maintains bank accounts, savings accounts, lines of credit, and other such financial relationships; and

(6) in which state the individual maintains a permanent place of abode.

(e) Alaska residents may apply for a reduced fee of $15 for the issuance of an interim-use permit or the annual renewal of an interim-use or entry permit if their total family income falls within the poverty guidelines for the Legal Services Corporation, as set out in Appendix A to 45 C.F.R. 1611, and as modified by Alaska regional cost-of-living differentials. A commission publication entitled *CFEC Map/Cost of Living Differentials* contains maps designating the regions and charts showing regional cost-of-living differentials, and is incorporated in this section by reference.

(f) A non-resident may apply for a reduced fee of $45 for the issuance of either an interim-use permit or the annual renewal of an interim-use or entry permit if the

non-resident's total family income falls within the poverty guidelines for the Legal Services Corporation, as set out in Appendix A to 45 C.F.R. 1611. (Eff. 12/27/79, Register 72; am 1/2/81, Register 77; am 3/4/81, Register 78; am 1/29/82, Register 81; am 10/30/82, Register 84; am 12/30/82, Register 84; am 10/28/84, Register 92; am 12/29/84, Register 92; am 4/13/85, Register 94; am 9/26/85, Register 95; am 11/22/87, Register 104; am 11/26/87, Register 104; am 1/17/91, Register 117; am 2/8/95, Register 133; am 5/4/95, Register 134)

Authority:

AS 01.10.055 AS 16.43.110 AS 16.43.160
AS 16.43.100 AS 16.43.140 AS 16.43.990

Donald H. CARLSON, Warren Hart, Gerard Haskins, Stephen R. Libby, Earl Weese, and Lyla C. Weese, Individually and as Class Representatives on behalf of All Persons Similarly Situated, Appellants,

v.

STATE of Alaska, COMMERCIAL FISHERIES ENTRY COMMISSION, Appellee.

No. S-6590.

Supreme Court of Alaska.

June 21, 1996.

Class action was brought challenging the constitutionality of state's practice of charging nonresident commercial fishermen three times as much as resident fishermen for commercial licenses and limited entry permits. The Superior Court, Third Judicial District, Anchorage, Karen L. Hunt, J., denied relief, and class appealed. The Supreme Court, 798 P.2d 1269, affirmed in part, reversed in part, and remanded. On remand, the Superior Court, Peter A. Michalski, J., concluded that fee differential did not violate either the commerce clause or the privileges and immunities clause, and class again appealed. The Supreme Court, Compton, J., held that: (1) commerce clause was not implicated in challenge to fee differential, as differential was not predicated upon the movement of articles of commerce across state lines, but rather upon residency status of those applying for permits; (2) disparate fees charged to nonresidents did not offend privileges and immunities clause if differential did not exceed contribution made by residents to fisheries

management, because differential would be justified as imposing on nonresidents their share of costs of commercial fisheries; and (3) proper method by which to calculate contribution made by residents was per capita formula proposed by class, rather than pro rata formula proposed by state.

Reversed and remanded.

Rabinowitz, J., filed dissenting opinion.

Loren Domke, Loren Domke, P.C., Juneau, for Appellants.

Stephen M. White, Marie Sansone, Assistant Attorneys General, and Bruce M. Botelho, Attorney General, Juneau, for Appellee.

Before RABINOWITZ, MATTHEWS, COMPTON and EASTAUGH, JJ.

OPINION

COMPTON, Justice.

I. *INTRODUCTION*

This is the second appeal from a class action challenging the State of Alaska's practice of charging nonresident commercial fishers licensing and limited entry permit fees which are three times greater than the fees charged resident commercial fishers. The class is comprised of "all persons who participated in one or more Alaska commercial fisheries at any time who paid nonresident assessments to the State for commercial or gear licenses or permits." *Carlson v. State*, 798 P.2d 1269, 1270

(Alaska 1990) (*Carlson I*). In this appeal the class challenges the superior court's grant of summary judgment to the State. The class contends that the superior court misinterpreted our mandate on remand and that the fee differential violates the Commerce Clause[1] and Privileges and Immunities Clause[2] of the United States Constitution. We reverse and remand.

II. *FACTS AND PROCEEDINGS*

This appeal, like *Carlson I*, contests the constitutionality of AS 16.05.480, AS 16.43.160 and Alaska Administrative Code (AAC) 20.05.240.[3] Under AS 16.05.480 a resident pays $30 per year for a commercial fishing license, while a nonresident pays $90 per year for the same license. Similarly, under 20 AAC 5.240(a)(1)-(4) nonresidents pay three times more for limited entry permits. The fee for limited entry permits is determined by the value of the permit;[4] the fee range,

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[1] The United States Constitution provides: "The Congress shall have power . . . To regulate commerce with foreign nations, and among the several States and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3.

[2] The Privileges and Immunities Clause of United States Constitution provides: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." U.S. Const. art. IV, § 2.

[3] AS 16.43.160 is the authority under which the Commercial Fisheries Entry Commission (CFEC) adopted 20 AAC 5.240.

[4] The profitability of the different fisheries, and hence the value of permits, varies dramatically. For example, the average gross earnings per permit for the Chignik salmon seine fishery ranged from $88,709 to $265,525 for the years 1983 through 1993.

for residents, is from $50 to $250.[5] *See* 20 AAC 5.240(a)(1)-(4).

In *Carlson I* the class alleged: (1) violations of the Privileges and Immunities Clause and Commerce Clause; and (2) the absence of State statutory authority to charge this type of fee differential prior to January 1983. We rejected the class's second contention that the statute did not authorize the 3:1 differential prior to 1983. *Carlson I*, 798 P.2d at 1278-79. However, as to the first issue we remanded the case and imposed on the State the burden of persuasion in defending the Commerce Clause and Privileges and Immunities challenges. *Id.* at 1274-78. With regard to the Privileges and Immunities Clause question we held:

> Commercial fishing is a sufficiently important activity to come within the purview of the Privileges and Immunities Clause, and license fees which discriminate against nonresidents are

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The permit fee for this fishery is $250 for residents and $750 for nonresidents. During the same time period the average gross earnings per permit for the Bristol Bay herring spawn on kelp fishery ranged from $847 to $1613. The permit fee for this fishery is $50 for residents and $150 for nonresidents.

[5] The State notes that there is no evidence that this fee differential has discouraged nonresidents from participating in Alaska's commercial fisheries. During the period between 1982 and 1992 the participation of nonresidents in Alaska fisheries continued to increase. The State also emphasizes that virtually every state that has a commercial fishing industry has higher nonresident licensing and permitting fees. In many of these states the differential between resident and nonresident fees exceeds the one contested here.

> *prima facie* a violation of it. . . . Thus the questions here are whether the state has a substantial reason for the discrimination, and whether the 3:1 fee ratio bears a sufficiently close relationship to the goal.

Carlson I, 798 P.2d at 1274 (citations omitted). In imposing the burden of persuasion on the State on this issue we adopted the Wisconsin Supreme Court's analysis. *See Taylor v. Conta*, 106 Wis.2d 321, 316 N.W.2d 814, 823 n. 17 (1982). In doing so we held that "the burden of persuasion to demonstrate justification is properly on the state."[6] *Carlson I*, 798 P.2d at 1276.

We framed the issue on remand as, "whether all fees and taxes which must be paid to the state by a nonresident to enjoy the state-provided benefit are substantially equal to those which must be paid by similarly situated residents when the residents' *pro rata* shares of state revenues to which nonresidents make no contribution are taken into account." *Carlson I*, 798 P.2d at 1278. We also held that the revenues derived by the State from petroleum production are "analytically[ ] equivalent to 'taxes which only residents pay.' " *Carlson I*, 798 P.2d at 1278.

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[6] We similarly imposed the burden of proof on the Commerce Clause challenge on the State. We held:

> [O]nce a state law is shown to discriminate against interstate commerce "either on its face or in practical effect," the burden falls on the State to demonstrate both that the statute "serves a legitimate local purpose," and that this purpose could not be served as well by available nondiscriminatory means.

Carlson I, 798 P.2d at 1277 (quoting *Maine v. Taylor*, 477 U.S. 131, 138, 106 S.Ct. 2440, 2447, 91 L.Ed.2d 110 (1986)).

On remand the parties cross-moved for summary judgment, each proposing a different method by which to compare the fees being paid by nonresidents with the expenditures of state revenues to which the nonresidents make no contribution (the costs to residents). The class proposed what it termed the *per capita* formula. The *per capita* formula computes the contribution made by each resident to the cost of maintaining the commercial fisheries and compares this with the fee differential. The State proposed what it termed the *pro rata* formula. The *pro rata* formula in effect compares the total contributions made to the cost of commercial fisheries by residents to the total fees paid by nonresidents. The superior court concluded that under this method of analysis, residents paid by way of taxes (or their analytical equivalent) substantially more than nonresident fishers paid. In reaching this conclusion, the superior court applied the State's proposed formula to the categories of expenses accepted by us in *Carlson I*.[7] As the licensing and permitting fees charged nonresidents did not exceed the amount paid by

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[7] The State presented additional budget figures which included an analysis of every state agency for the years 1981 through 1993. The State claims that these figures included expenditures to which only Alaska residents contributed and which benefitted only commercial fishers. The class requested a stay and a reopening of discovery to address these new figures. The superior court determined that as it had not relied on the new figures in granting summary judgment, any dispute over these figures was moot. However, the court did reserve the right to reconsider this decision if this court determined that the class's *per capita* method should have been employed.

residents, the superior court concluded that the differential did not violate either the Commerce Clause or the Privileges and Immunities Clause. The class appeals.

III. *DISCUSSION*

A. *Standard of Review*

Both parties correctly argue that the Commerce Clause and the Privileges and Immunities Clause challenges to AS 16.05.480, AS 16.43.160 and 20 AAC 5.240 present questions of constitutional law which we review *de novo*. *See Wright v. Black*, 856 P.2d 477, 479 (Alaska 1993). The issue of whether the superior court erred in adopting the *pro rata* formula to calculate the contribution to commercial fisheries management made by residents is also an issue of law which we review *de novo*. *Langdon v. Champion*, 745 P.2d 1371, 1372 n. 2 (Alaska 1987).

B. *The Challenged Fee Differential under the Commerce Clause*

The class contends that two recent Supreme Court decisions require that the different fees charged to residents and nonresidents under AS 16.05.480, AS 16.43.160 and 20 AAC 5.240 be analyzed under the Commerce Clause.[8] *See Oregon Waste Systems v. Dep't of Envtl. Quality*, 511 U.S. 93, ___, 114 S.Ct. 1345, 1350, 128 L.Ed.2d 13

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[8] In *Carlson I* we left open the question of whether this case was governed by the Commerce Clause. We noted that earlier Supreme Court cases had suggested that the Commerce Clause does not apply to fish until the fish are actually harvested. *Carlson I*, 798 P.2d at 1276 n. 4 (citing *McCready v. Virginia*, 94 U.S. 391, 396, 24 L.Ed. 248 (1876); *Toomer v. Witsell*, 334 U.S. 385,

(1994); *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 112 S.Ct. 2009, 119 L.Ed.2d 121 (1992). The class argues that the fee differentials in these statutes and regulations violate the negative Commerce Clause.[9] The class argues AS 16.05.480, AS 16.43.160 and 20 AAC 5.240 are *per se* invalid under the Commerce Clause. A substantial portion of the class's briefs is devoted to analogizing the different commercial licensing and permit fees

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394-395, 68 S.Ct. 1156, 1161, 92 L.Ed. 1460, *reh'g denied*, 335 U.S. 837, 69 S.Ct. 12, 93 L.Ed. 389 (1948)).

[9] The grant of regulatory power to Congress implicit in the Commerce Clause has been interpreted to have a "negative" aspect "that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Systems, Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, ___, 114 S.Ct. 1345, 1349, 128 L.Ed.2d 13 (1994) (citing *Wyoming v. Oklahoma*, 502 U.S. 437, 112 S.Ct. 789, 117 L.Ed.2d 1 (1992)). A negative Commerce Clause analysis has two steps. First, the court must determine whether the challenged statute discriminates against interstate commerce or "regulates evenhandedly with only 'incidental' effects on interstate commerce." *Oregon Waste Systems*, 511 U.S. at ___, 114 S.Ct. at 1350 (citations omitted). Second, "[i]f the restriction is discriminatory – i.e., favors in-state economic interests over their out-of-state counterparts – it is virtually *per se* invalid." *Id.* at ___, 114 S.Ct. at 1347. A restriction found to be *per se* invalid must be struck down unless the state can "show that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Id.* at ___, 114 S.Ct. at 1351 (citations omitted). The justifications for a discriminatory tax or restriction must pass the strictest scrutiny. *Id.* at ___, 114 S.Ct. at 1351. However, if the restriction is nondiscriminatory it is valid unless the burden it imposes on interstate commerce "is clearly excessive in relation to the putative local benefits." *Id.* (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970)).

charged residents and nonresidents to surcharges the states of Oregon and Alabama imposed on out-of-state waste. The Supreme Court struck down these surcharges. *Oregon Waste Systems*, 511 U.S. at ___, 114 S.Ct. at 1355; *Chemical Waste*, 504 U.S. at 334, 112 S.Ct. at 2009. The class contends that under the reasoning employed in *Oregon Waste Systems* and *Chemical Waste*, the 3:1 fee differential is tantamount to "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Systems*, 511 U.S. at ___, 114 S.Ct. at 1350.

Oregon Waste Systems does not require that the fee differential challenged herein be evaluated under the Commerce Clause. In both *Oregon Waste Systems* and *Chemical Waste*, the Court found taxes imposed on out-of-state waste which were greater than the taxes imposed on in-state waste violated the negative Commerce Clause. In applying the negative Commerce Clause analysis in *Oregon Waste Systems*, the Court emphasized that the Commerce Clause prohibits states from unjustifiably discriminating against or burdening the interstate flow of *articles of commerce*. *Oregon Waste Systems*, 511 U.S. at ___, 114 S.Ct. at 1349. The Court went on to hold that "[i]t is well-established, however, that a law is discriminatory if it 'tax[es] a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State.' " *Oregon Waste Systems*, 511 U.S. at ___, 114 S.Ct. at 1350 (quoting *Chemical Waste*, 504 U.S. at 342, 112 S.Ct. at 2013).

Unlike the fee differentials in *Oregon Waste Systems* and *Chemical Waste*, the fee differentials at issue in this case are not predicated upon the movement of articles of

commerce across state lines, but rather upon the residency status of those applying for permits. The Supreme Court has consistently analyzed statutes which purportedly classify on the basis of residency under the Privileges and Immunities or the Equal Protection Clauses.[10] In *Toomer v. Witsell*, 334 U.S. 385, 68 S.Ct. 1156, 92 L.Ed. 1460 (1948), the Court evaluated South Carolina shrimping license fees, which were one hundred times greater for non-residents than for residents, under the Privileges and Immunities Clause. There the Court observed that the Privileges and Immunities Clause "was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy."[11] *Toomer*, 334 U.S. at 395, 68 S.Ct. at 1162.

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[10] *See United Bldg. & Const. v. Mayor & Council of Camden*, 465 U.S. 208, 215-19, 104 S.Ct. 1020, 1026-28, 79 L.Ed.2d 249 (1984) (analyzing a municipal resident hiring preference under the Privileges and Immunities Clause); *Hicklin v. Orbeck*, 437 U.S. 518, 524, 98 S.Ct. 2482, 2486-87, 57 L.Ed.2d 397 (1978) (evaluating under the Privileges and Immunities Clause the Alaska Hire Law which preferenced Alaska residents in hiring); *Sosna v. Iowa*, 419 U.S. 393, 406, 95 S.Ct. 553, 560-61, 42 L.Ed.2d 532 (1975) (reviewing Iowa's durational residency requirement for divorces under the Privileges and Immunities Clause); *see also Baldwin v. Fish & Game Comm'n of Montana*, 436 U.S. 371, 383, 98 S.Ct. 1852, 1860, 56 L.Ed.2d 354 (1978) (stating that the Privileges and Immunities Clause "has been interpreted to prevent a State from imposing unreasonable burdens on Citizens of other States in their pursuit of common callings within the State" (citations omitted)).

[11] In *Anderson v. Mullaney*, 191 F.2d 123 (9th Cir.1951), *aff'd* 342 U.S. 415, 72 S.Ct. 428, 96 L.Ed. 458 (1952), the Ninth Circuit struck down on Commerce Clause grounds an Alaska territorial statute which charged non-resident fishermen a higher license fee than resident fishermen. On certiorari the Supreme Court

C. *The Challenged Fee Differential under the Privileges and Immunities Clause*

The class contends also that the nonresident fee differential violates the Privileges and Immunities Clause of the United States Constitution. The Privileges and Immunities Clause is not absolute. "[I]t does not preclude disparity of treatment [of citizens of other states] in the many situations where there are perfectly valid independent reasons for it." *Toomer*, 334 U.S. at 396, 68 S.Ct. at 1162. A claim that a residency classification violates the Privileges and Immunities Clause requires a two-step inquiry:

> First, the activity in question must be sufficiently basic to the livelihood of the Nation . . . as to fall within the purview of the Privileges and Immunities Clause. . . .
>
> Second, if the challenged restriction deprives nonresidents of a protected privilege, we will invalidate it only if we conclude that the restriction is not closely related to the advancement of a substantial state interest.

Supreme Court of Virginia v. Friedman, 487 U.S. 59, 64-65, 108 S.Ct. 2260, 2264, 101 L.Ed.2d 56 (1988) (internal quotations and citations omitted).

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affirmed on Privileges and Immunities rather than Commerce Clause grounds, following *Toomer v. Witsell*. Assuming that the Commerce Clause would also apply to cases of this nature, it is difficult to believe that a license fee differential which passes muster under the Privileges and Immunities analysis would nonetheless be an unconstitutional discrimination against interstate commerce.

We determined in *Carlson I* that commercial fishing is a sufficiently important activity to come within the purview of the Privileges and Immunities Clause. 798 P.2d at 1274. However, the class claims that for us to find for the State on the relatedness prong of the inquiry, the State "must demonstrate that behind the nonresident surcharge or differential is a[sic] (1) substantial reason advancing a legitimate State policy and (2) the means employed by the statutory scheme must be closely tailored and have a substantial relationship to a legitimate interest served by the statute." Appellant's Brief at 27.

We have already made the first inquiry. In *Carlson I*, we held that equalizing the burden of fisheries management, "where residents pay proportionately more in foregone benefits than nonresidents for fisheries management," was a substantial State interest. *Id.* at 1278. However, we concluded that the record did not contain sufficient evidence to determine whether the differential in fees charged residents and nonresidents was sufficiently related to this interest to justify such disparate treatment. *Id.* at 1278.

The class questions the relatedness of the fee differential to the burden of fisheries management borne by residents. It analogizes this case to other Supreme Court cases, and challenges our conclusion in *Carlson I* that petroleum revenues are the analytical equivalent of taxes. The class argues that *Oregon Waste Systems* prohibits the State from arguing that the fee differentials do not discriminate against nonresidents because they merely impose on nonresidents their share of the costs of fisheries management. It claims that under the reasoning of *Oregon Waste Systems*, neither general tax revenues nor oil

royalty revenues can be viewed as the residents' contributions to fisheries management.[12]

There are two flaws with the class's argument. First, *Oregon Waste Systems* was a Commerce Clause case. *See Oregon Waste Systems*, 511 U.S. at ___, 114 S.Ct. at 1349. Although the reasoning in Privileges and Immunities Clause cases has been used in Commerce Clause cases, it is not analytically sensible to do the reverse in this case. In this case the Privileges and Immunities Clause question turns on whether there is a sufficient relationship between the higher fees charged nonresidents and the State's interest in imposing on nonresidents their share of the costs for managing the State's commercial fisheries. In *Oregon Waste Systems*, the issue was whether the interstate and intrastate taxes are imposed on sufficiently equivalent events such that they could be considered proxies for each other. *See Id.* at ___-___, 114 S.Ct. at 1352-53. These are different inquires for which the analysis is not interchangeable.[13]

Second, the class's argument demonstrates a lack of understanding of our holding in *Carlson I*. Contrary to the

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[12] The class calls this its "attribution of tax revenues" argument.

[13] Additionally, the Supreme Court in *Oregon Waste Systems* had reasons other than the disparity between the events being taxed for finding that the Department of Environmental Quality's compensatory tax argument was disingenuous. For example, the Court expressed concern over the fact that the out-of-state surcharge was actually assessed on in-state shippers who already paid Oregon income taxes, the very tax the surcharge supposedly balanced out. *See Oregon Waste Systems*, 511 U.S. at ___, 114 S.Ct. at 1353.

class's contentions, we did not advocate the kind of fee-shifting denounced by the Supreme Court in *Oregon Waste Systems*. In *Carlson I* we did not advance a compensatory tax doctrine which would impose on nonresidents their entire share of the costs of commercial fisheries management, while resident fishers' share of these costs was borne by the entire population of the State. Rather, we held that the issue is

> whether all fees and taxes which must be paid to the state by a nonresident to enjoy the state-provided benefit are substantially equal to those which must be paid by similarly situated residents when the residents' *pro rata* shares of state revenues to which nonresidents make no contribution are taken into account.

Carlson I, 798 P.2d at 1278. The disparate fees charged to nonresidents will not offend the Privileges and Immunities Clause if the differential does not exceed the contribution made by residents, because the differential will be justified as imposing on nonresidents their share of the costs of commercial fisheries. The fee differential merely balances out "any conservation expenditures from taxes which only residents pay." *Toomer*, 334 U.S. at 399, 68 S.Ct. at 1163.[14] In *Carlson I* we held that the State bore the burden of persuasion on this issue. 798 P.2d at 1276. This burden should be met by calculating the contribution made by residents and comparing it with the challenged fee differentials.

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[14] In *Oregon Waste Systems*, the Court gave no indication that it intended to cast doubt on this aspect of *Toomer*.

D. *The State's Pro Rata Method of Calculating the Amount Residents Contribute to Fisheries Management*

To establish "practical equality" between residents and nonresidents, the State must demonstrate that the higher fees charged nonresidents are equivalent to the burden borne by residents as measured by the "residents' *pro rata* shares of state revenues to which nonresidents make no contribution." *Carlson I*, 798 P.2d at 1278. The *per capita* formula propounded by the class is the correct method for calculating the contribution made by residents.

Under the *per capita* formula the resident contribution is calculated in the following manner: (Fisheries Budget/ Alaska Population) X (percentage of State Budget from oil revenues/1.0). *See Appendix A.* Once this computation is made the resident contribution can be compared to the difference in fees paid by nonresidents to determine if the fee differential is constitutional.

The State advocates a different formula for computing the resident contribution. The State's formula utilizes a three-step approach. The State would (1) calculate the expenditures or costs of the commercial fisheries (enforcement and conservation); (2) determine the resident and nonresident commercial fishers' respective *pro rata* shares of those expenditures; and (3) compare the percentage of its respective *pro rata* share each group is paying. *See Appendix A.*

The State's formula differs from the class's when it comes to deciding how to determine the numbers to be used in steps two and three. Although the formulae are

theoretically different and are calculating different quantities, the significant difference between the two proposed formulae concerns how the residents' *pro rata* share is calculated. As discussed above, the class argues that the amount used as the divisor of the commercial fisheries expenditures from taxes which only residents pay must be the total number of Alaskans. It correctly asserts that using this number will allow the court to determine the *per capita* contribution actually being made by each of the resident permit holders. On the other hand, the State argues that the holdings in *Toomer* and *Carlson I* mandate that the residents' contribution should be determined by dividing the fisheries' expenditures from taxes by the number of resident permits issued in any given year.[15] The State is wrong. As stated above, in *Carlson I* we held that the relevant inquiry was "whether all fees and taxes which must be paid to the state by a nonresident to enjoy the state-provided benefit are substantially equal to those which must be paid by similarly situated residents when the residents' *pro rata* shares of state revenues to which nonresidents make no contribution are taken into account." *Carlson I*, 798 P.2d at 1278. Thus, we ordered the superior court to compare the relative burden placed on resident and nonresident commercial fishers. The *per capita* method does just this. Had *Carlson I* mandated a comparison of the expenditures made by the State to the

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[15] This is not exactly accurate because the State's formula never calculates the actual amount that each individual resident is purported to contribute. Rather, the State's formula calculates the percentages of their fair share of costs residents and nonresidents pay.

contribution made by nonresident fishers, the State's theory would be correct.[16] Resident commercial fishers are paying the license and permit fees they are charged plus their *per capita* share of oil revenues which are diverted to fisheries management from other benefits or State services. It is this quantity which must be equivalent to the fee differential for the fees to be constitutional under the *Carlson I* analysis. *See Carlson I*, 798 P.2d at 1278.[17]

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[16] However, this would be just the kind of compensatory tax rationale which the Supreme Court struck down in *Oregon Waste Systems*.

[17] The State also argues that the *per capita* formula should be rejected because it has never been used by any court in any context. The State cites a string of equal protection cases to support this assertion. *See Baldwin*, 436 U.S. 371, 98 S.Ct. 1852, 56 L.Ed.2d 354 (1978); *LCM Enterprises, Inc. v. Town of Dartmouth*, 14 F.3d 675 (1st Cir.1994); *Johns v. Redeker*, 406 F.2d 878 (8th Cir.1969). However, these equal protection cases have no bearing on the suitability of the *per capita* approach in this case. In *Baldwin* the comparison being made was between the state's costs for maintenance of the big-game populations, not the contributions made by resident big-game hunters to the maintenance of big-game populations. *Baldwin*, 436 U.S. at 389, 98 S.Ct. at 1863. Additionally, in *Baldwin* the calculations were being viewed under the rational basis test, a more lenient standard than the intermediate scrutiny required in this case. *Baldwin*, 436 U.S. at 390-91, 98 S.Ct. at 1864. Similarly, *LCM Enterprises* is inapplicable because it too involved the application of the rational basis test, which only requires that the classification being challenged is rationally related to the legitimate state interest. *LCM Enterprises*, 14 F.3d at 679. *Johns* also has no relevance to the issue at hand because the court in *Johns* does not discuss the method the trial court used to determine the resident contribution which was being compared with the higher fees charged to nonresidents. *Johns*, 406 F.2d at 883.

As we have concluded that the resident contribution must be calculated using the class's *per capita* formula, we remand the case for the application of this formula. If under the formula the fee differential exceeds the resident contribution, the State will have failed to demonstrate that the means employed by its statute have a substantial enough relationship to the legitimate interest of the statute to survive Privileges and Immunities Clause review. Conversely, if the superior court finds that the fee differential is not greater than the resident contribution, the State has successfully carried its burden of proving that the means employed by its statutory scheme are substantially related to the legitimate interest served by the statute. On remand the superior court shall address issues relating to the additional budget figures presented by the State. It will need to determine whether to accept these new figures and decide whether it should grant a stay and reopen discovery in order to allow the class to respond to the State's presentation of these new figures.

E. *Prejudgment Interest of the Unlawful Portion of the License Fees from the Date the Class Action Was Filed*

The class seeks a refund under AS 43.10.210,[18] of all unlawfully exacted fees from the date of filing the lawsuit

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[18] AS 43.15.010 was renumbered 43.10.210. AS 43.10.210(a) provides:

> The Department of Administration shall, with the approval of the attorney general and the Department of Revenue, refund to a taxpayer the amount of a tax paid to the Department of Revenue under protest and deposited in the treasury if

with statutory prejudgment interest calculated under AS 45.45.010. In *Carlson I* we held that AS 43.15.010 would govern any refund in this case, and that if the class succeeded on its constitutional claims it could only recover unlawfully collected fees if it could satisfy the protest requirement of AS 43.15.010. 798 P.2d at 1279-80. We remanded for further findings on whether the State had waived the protest requirement, thereby allowing a refund of all fees not barred by the statute of limitations. *Id.* The superior court found that the State had not waived the protest requirement.

The class admits that it could not have satisfied the protest requirement for the taxes paid prior to the filing of the lawsuit, and thus does not seek a refund of any unlawfully assessed fees paid prior to June 22, 1984. However, the class claims that the filing of the complaint in the case at bar fulfills the protest requirement.

Although the State does not address this issue in its brief, the record indicates that the State agrees that those fees which were paid after June 22, 1984, were paid under protest sufficient to permit a refund under AS 43.10.210. This does not mean that the State concedes that any refund would be due if the class succeeds. The State argued below that it only had conceded that the protest requirement of AS 43.10.210 had been met, and that this "is merely one precondition to the '[r]ecovery of overpayments and protested payments.' " Because the State does

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(1) the taxpayer recovers judgment against the Department of Revenue for the return of the tax. . . .

not brief this issue, it is impossible to know whether it would still make this argument.

If on remand the superior court determines that the class has prevailed, the superior court must also decide whether the filing of this suit constituted notice sufficient to comply with the protest requirement of AS 43.10.210(a), and whether prejudgment interest is due under AS 45.45.010.

IV. *CONCLUSION*

We conclude that this appeal does not implicate the Commerce Clause. We REVERSE the superior court's approval of the State's *pro rata* formula of calculating and comparing the taxation burden placed on resident and nonresident commercial fishers, and we REMAND for application of the class's *per capita* formula. We also order that on remand the superior court address the unresolved issues concerning the appropriate budget items to be considered in determining the State's expenditures (*i.e.*, resident contributions). Additionally, if the superior court finds for the class, it must determine the date from which the class should be given a refund, and what, if any, interest is due on that refund.

APPENDIX

The following is a comparison of the two proposed formulae which uses the statistics proffered by the State for the years 1982 through 1989. It is difficult to compare the State's and class's formulae because they calculate

and compare different quantities in an attempt to measure what residents and nonresidents are paying. The class's formula calculates the fee differential which would be allowable, while the State's formula computes the respective percentages of costs of running the commercial fisheries which residents and nonresidents could pay and still be "treated similarly."

A. *Application of the Class's Per Capita Formula*

The class's *per capita* formula: Fisheries Budget/ Alaska Population x Percentage State Budget from Oil Revenues.

1982: $29,000,000 / 500,000[19] x 83% = $48.14
1983: $31,000,000 / 500,000 x 81% = $50.22
1984: $34,000,000 / 500,000 x 82% = $55.76
1985: $34,800,000 / 500,000 x 82% = $57.07
1986: $34,500,000 / 500,000 x 86% = $59.34
1987: $29,600,000 / 500,000 x 76% = $44.99
1988: $29,300,000 / 500,000 x 83% = $48.64
1989: $29,900,000 / 500,000 x 82% = $49.04

Under the *per capita* formula the allowable fee differential will vary from year to year. For example, in 1982 the difference between a resident and nonresident permit could not substantially exceed $48.14, while in 1986 the difference could not substantially exceed $59.34.

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[19] For the purpose of this example we will assume that the population of Alaska is 500,000.

B. *Application of the State's Pro Rata Formula*

The State's formula calls for the comparison of two calculations: (1) Fair Share of Resident Costs = (Residents' Pro Rata Share[20]) x (Fisheries Budget x Percentage of State Revenue from Oil); and (2) Fair Share Nonresident Costs = (Nonresidents' Pro Rata Share[21]) x (Fisheries Budget x Percentage of State Revenue from Oil).

The following two tables are the application of these formulae.

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[20] Residents' Pro Rata Share: (Percentage of Permits Held by Residents) x (Fisheries Budget).

[21] Nonresidents' Pro Rata Share: (Percentage of Permits Held by Nonresidents) x (Fisheries Budget).

Percentage of State's Commercial Fishery Expenditures Paid By Residents:

Fiscal Year	*Column 1 % of Limited Entry Permits Held By Residents*	*Column 2 Total Expenditures By Four Agencies For Commercial Fishery Management*	*Column 3 Residents' Pro Rata Share of Total Expenditures*	*Column 4 % of the Total State Revenues To Which Nonresidents Make No Contribution*	*Column 5 Residents' Pro Rata Share of Expenditures From Revenues To Which Nonresidents Make No Contribution*	*Column 6 Residents' Fees Paid For Licenses and Permits*	*Column 7 Total Amount Paid By Residents To Participate in Commercial Fisheries*	*Column 8 % Paid By Residents of Their Pro Rata Share of State Expenditures For Commercial Fisheries*
1982	*83%*	*$29.0*	*$24.1*	*83%*	*$20*	*1.3*	*$21.3*	*88%*
1983	*84%*	*$31.0*	*$26.0*	*81%*	*$21.1*	*1.3*	*$22.4*	*86%*
1984	*85%*	*$34.0*	*$28.9*	*82%*	*$23.7*	*1.2*	*$24.9*	*86%*
1985	*84%*	*$34.8*	*$29.2*	*82%*	*$23.9*	*1.5*	*$25.4*	*87%*
1986	*84%*	*$34.5*	*$29.0*	*86%*	*$24.9*	*1.5*	*$26.4*	*91%*
1987	*82%*	*$29.6*	*$24.3*	*76%*	*$18.5*	*1.7*	*$20.2*	*83%*
1988	*82%*	*$29.3*	*$24.0*	*83%*	*$19.9*	*2.0*	*$21.9*	*91%*
1989	*82%*	*$29.9*	*$24.5*	*82%*	*$20.1*	*2.0*	*$22.1*	*90%*

Percentage of State's Commercial Fishery Expenditures Paid By Nonresidents:

Year	*Column 1* *% of Limited Entry Permits Held By Nonresidents*	*Column 2* *Total Expenditures By Four Agencies For Commercial Fishery Management*	*Column 3* *Nonresidents' Pro Rata Share of Total Expenditures*	*Column 4* *Nonresidents' Fees Paid For Licenses and Permits*	*Column 5* *% Paid By Nonresidents of Their Pro Rata Share of State Expenditures For Commercial Fisheries*
1982	*17%*	*$29.0*	*$4.9*	*$1.3*	*27%*
1983	*16%*	*$31.0*	*$5.0*	*$1.2*	*24%*
1984	*15%*	*$34.0*	*$5.1*	*$1.0*	*20%*
1985	*16%*	*$34.8*	*$5.6*	*$1.2*	*21%*
1936	*16%*	*$34.5*	*$5.5*	*$1.3*	*24%*
1987	*18%*	*$29.6*	*$5.3*	*$1.6*	*30%*
1988	*18%*	*$29.3*	*$5.3*	*$2.3*	*43%*
1989	*18%*	*$29.9*	*$5.4*	*$2.2*	*41%*

Under the *pro rata* formula the differential is constitutional as long as the percentage of fair costs nonresidents are paying does not exceed the percentage of fair costs that residents are paying. Thus, the fee differential was constitutional in 1983 because residents paid 86% of their share and nonresidents only paid 24% of their share. As stated in the text of the opinion, the flaw with this formula is that it treats the resident fishers as if they alone are paying the tax equivalent (percentage of revenues to which nonresidents make no contribution). For this formula to accurately calculate the resident fishers' contribution, it would need to divide the residents' *pro rata* fair share by the population of Alaska and then multiply by the number of resident fishers.

RABINOWITZ, Justice, dissenting.

The majority concludes that since *Oregon Waste Systems v. Department of Environmental Quality*, 511 U.S. 93, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994), was decided under the Commerce Clause as opposed to the Privileges and Immunities Clause, its reasoning is inapposite here. I cannot agree.

The United States Supreme Court has long acknowledged "the mutually reinforcing relationship between the Privileges and Immunities Clause of Art. IV, § 2, and the Commerce Clause – a relationship that stems from their common origin in the Fourth Article of the Articles of Confederation and their shared vision of federalism. . . ." *Hicklin v. Orbeck*, 437 U.S. 518, 531-32, 98 S.Ct. 2482, 2490, 57 L.Ed.2d 397 (1978). It has, in fact, endorsed the methodology of referring to Commerce Clause precedent in

deciding claims based solely on the Privileges and Immunities Clause. *Id. See also Sestric v. Clark*, 765 F.2d 655, 664 (7th Cir.1985) ("The two clauses are part of the same document, drafted by very intelligent and careful men; why would they have wanted the same discrimination against nonresidents to be tested by a different standard, depending on which clause was cited in the complaint?").

I do not mean to suggest that the two clauses are completely interchangeable. The differences between them, however, appear to primarily involve matters of scope as opposed to content. For example, the market regulator – market participant doctrine can shield a state from Commerce Clause attack but not from a claim based on the Privileges and Immunities Clause. *United Bldg. & Constr. Trades Council v. Mayor*, 465 U.S. 208, 221-22, 104 S.Ct. 1020, 1029, 79 L.Ed.2d 249 (1984). On the other side of the equation, the Commerce Clause protects corporations, while the Privileges and Immunities Clause does not. *Paul v. Virginia*, 75 U.S. (8 Wall) 168, 19 L.Ed. 357 (1869).

In this way discrimination predicated somehow on state affiliation can fall within the scope of the Privileges and Immunities Clause alone, the Commerce Clause alone, both clauses, or, for that matter, neither.[1] Once it

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[1] A well-recognized example of this last category would be a policy of discriminating against nonresidents in the granting of recreational game or fishing license fees. This kind of state discrimination does not implicate the Commerce Clause since it does not significantly burden interstate commerce, and it does not implicate the Privileges and Immunities Clause because it does not involve a fundamental right. *See, e.g.*,

has been determined that a discriminatory policy falls within the purview of one or both of these clauses, however, I am not persuaded that the methodology of the two should diverge in any significant respect. The extent to which the interpretation of these two clauses has historically been interwoven confirms this assessment.

Further, the level of scrutiny triggered by a discriminatory policy that falls within the scope of either of these clauses appears to be very nearly identical. Professor Tribe has observed that the standard of review employed in Privileges and Immunities cases is "almost as demanding as that elaborated by the Warren Court in equal protection and first amendment strict scrutiny."[2] Similarly, in *Oregon Waste Systems*, the Supreme Court observed that Commerce Clause cases "require that justifications for discriminatory restrictions on commerce pass the 'strictest scrutiny.' " *Oregon Waste Systems*, 511 U.S. at ___, 114 S.Ct. at 1351. Under both clauses, the burden is placed on the state to provide a sufficient justification for its discriminatory policy.

Considering the significant similarities between the two clauses, it not surprising that in *Carlson I* we simply referenced our Privileges and Immunities Clause analysis in order to dispose of the Commerce Clause issue, concluding that "[t]he analysis under Article I, section 8, clause 3 of the United States Constitution (the Commerce Clause) is quite similar, assuming that it is implicated."

Baldwin v. Fish and Game Comm'n of Montana, 436 U.S. 371, 98 S.Ct. 1852, 56 L.Ed.2d 354 (1978).

[2] Lawrence H. Tribe, *American Constitutional Law* § 6-35, at 544 (2d ed.1988).

Carlson I, 798 P.2d at 1276. Indeed, we went on to state that "[i]t would be anomalous . . . to conclude that a law facially discriminating against interstate commerce could pass muster under the Privilege and Immunities Clause yet fail under the Commerce Clause; both clauses have a common origin in the fourth article of the Articles of Confederation." *Id.* at 1277 n. 5. In the wake of the United States Supreme Court's ruling in *Oregon Waste Systems*, however, the majority has reconsidered this position and concluded that, in fact, "the analysis is not interchangeable."

It is obvious that the fee discrepancy in this case implicates the Privileges and Immunities Clause. The policy is facially discriminatory, and it impairs an interest that is "fundamental" for purposes of Privileges and Immunities Clause analysis. Given the exceptionally close relationship between this clause and the Commerce Clause, I cannot, as noted above, join in the majority's summary rejection of the United States Supreme Court's reasoning in *Oregon Waste Systems*.

The justification offered by Oregon for discriminating against out-of-state interests in *Oregon Waste Systems* is very similar, if not identical, to the justification advanced by the State in the case at bar. The primary rationale is that out-of-state interests ought to be made to bear their "fair share" of the costs that their activities impose on the state. *Oregon Waste Systems*, 511 U.S. at ___, 114 S.Ct. at 1351; *Carlson I*, 798 P.2d at 1272. In both cases, the "share"

or contribution of in-state interests is augmented by general state tax revenues, or their analytical equivalent, in order to justify the tax or fee discrepancies.[3]

In *Carlson I*, we concluded that this kind of augmentation was acceptable under the holding of *Toomer v. Witsell*, 334 U.S. 385, 68 S.Ct. 1156, 92 L.Ed. 1460 (1948). In *Toomer*, the Supreme Court stated, in dicta, that a state could "charge non-residents a differential which would merely compensate the State . . . for any conservation expenditures from taxes which only residents pay." *Id.* at 399, 68 S.Ct. at 1163. The Supreme Court in *Oregon Waste Systems*, however, expressing its reluctance to "plunge . . . into the morass of weighing comparative tax burdens by comparing taxes on dissimilar events[,]" explicitly rejected this type of justification for state discrimination in the Commerce Clause context. *Oregon Waste Systems*,

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[3] Although the majority asserts that the fee-shifting we authorized in *Carlson I* is not the same kind of fee-shifting denounced by the Supreme Court in *Oregon Waste Systems*, I think that the similarities between the two far outweigh any potential differences. The approach authorized by the majority seems to place greater emphasis on the theoretical equality of individual contributions than the Oregon tax did. There is, however, no indication that the Oregon tax was designed to impose on out-of-state interests their "entire share" of solid waste disposal costs nor, for that matter, that the shares of disposers of in-state waste, who paid an $0.85 per ton fee, were to be borne by the entire population. More importantly, the decision in *Oregon Waste Systems* did not turn on the fact that the surcharge was excessive but rather on the conclusion that any surcharge was constitutionally offensive under the circumstances. Consequently, the majority's endorsement of the class's *per capita* approach does not sufficiently distinguish the fee discrepancies here from those in *Oregon Waste Systems*.

511 U.S. at ___, 114 S.Ct. at 1353 (citations and internal quotation marks omitted).

The majority correctly observes that the compensatory tax doctrine, focusing on whether or not the taxes which allegedly cancel each other out are imposed on "substantially equivalent events," finds its origins in Commerce Clause cases. It does not follow from this observation, however, that the doctrine has no place in Privileges and Immunities analysis. There is nothing inherent in this doctrine, or the policy concerns behind it, that indicates that it should only apply to discriminatory state taxation challenged under the Commerce Clause.

In *Armco, Inc. v. Hardesty*, 467 U.S. 638, 104 S.Ct. 2620, 81 L.Ed.2d 540 (1984), the Supreme Court struck down a discriminatory tax on the grounds that "manufacturing and wholesaling are not 'substantially equivalent events' " on which compensating taxes might be imposed. *Id.* at 643, 104 S.Ct. at 2623. In that case, West Virginia had imposed a wholesale gross receipts tax from which local manufacturers were exempt. The policy underlying the exemption was that it would put in-state manufacturers who were wholesaling their products in West Virginia on equal footing with their out-of-state competitors who were functionally exempt from West Virginia's manufacturing tax.[4] The Court rejected this justification, observing that

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[4] Presumably the only reason that the Privileges and Immunities Clause was not invoked in this case – where it would seem to be a natural choice – is that the plaintiff was a corporation not entitled to protection under that clause. As such, the *Armco* case provides an excellent example of how the

> [i]f Ohio or any of the other 48 States imposes a like tax on its manufacturers – which they have every right to do – then Armco and others from out of state will pay both a manufacturing tax and a wholesale tax while sellers resident in West Virginia will pay only the manufacturing tax.

Id. at 644, 104 S.Ct. at 2623.

Likewise, the Supreme Court in *Oregon Waste Systems* observed that Oregon's compensatory tax theory "ignore[s] the fact that shippers of waste from other States in all likelihood pay income taxes in other States, a portion of which might well be used to pay for waste reduction activities in those States." *Oregon Waste Systems*, 511 U.S. at ___ n. 7, 114 S.Ct. at 1353 n. 7.

In this respect the "substantially equivalent events" test essentially serves to identify a significant logical flaw that often infects "fair share" justifications for discriminatory taxes. I can see no reason to assume that this flaw is any less serious when it is exposed through litigation based upon the Privileges and Immunities Clause than it is when challenged under the Commerce Clause.[5]

"substantially equivalent events" test should apply with equal force regardless of which clause is invoked.

[5] A commentator has observed:

> While differences exist between the purposes and functions of the two constitutional clauses, they clearly exert overlapping spheres of influence. To hold the same tax invalid under one clause because it does not meet the substantially equivalent events requirement of the compensatory tax test, but valid under the other clause because it is important . . . that

The justification advanced by the State in this case suffers from precisely the same defect alluded to in both *Armco* and *Oregon Waste Systems*. Specifically, a fisher from Oregon who purchases a commercial license in Alaska will no doubt be under an obligation to pay Oregon income taxes, a portion of which probably will have been used for conservation costs in that state. Accordingly, the fee discrepancy places the Oregon fisher, as a nonresident, at a competitive disadvantage. In other words, both the Alaska fisher and the Oregon fisher are obliged to contribute to a general tax fund[6] from which their respective States may draw monies to support local fisheries, but only the Oregon fisher is being called upon to pay enhanced fees.

Restating our holding in *Carlson I*, the majority concludes that "[t]he disparate fees charged to nonresidents will not offend the Privileges and Immunities Clause if the differential does not exceed the contribution made by residents, because the differential will be justified as imposing on nonresidents their share of the costs of commercial fisheries." Implicit in this analysis is that a share

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> a state have power to preserve and regulate the exploitation of an important resource through means of a functionally compensatory tax, is surely to elevate form over substance.

Jeffrey J. Lamontagne, Note, *Oregon's Wasted Effort: The Supreme Court's Inability to Adapt its Compensatory Tax Doctrine to Solid Waste Regulations*, 19 Wm. & Mary Envtl. L. & Pol'y Rev. 345, 360 (1995) (citations and internal quotation marks omitted).

[6] The Alaskan fisher "contributes" in the form of foregone benefits from petroleum revenues.

of this state's petroleum revenues, the analytical equivalent to general tax revenues, should be attributed to the resident fishers in calculating their contribution. Since I believe that the United States Supreme Court's holding in *Oregon Waste Systems* effectively forecloses this method of justifying a discriminatory tax, I cannot agree.

On the basis of the Supreme Court's reasoning in *Oregon Waste Systems,* I conclude that the fee discrepancies authorized by AS 16.05.480, AS 16.43.160 and 20 AAC 05.240 violate the Privileges and Immunities Clause of the Constitution of the United States of America.

MOTION FILED
DEC 1 2 1996

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No. 96-685

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

DONALD H. CARLSON, WARREN HART, GERARD HASKINS, STEPHEN R. LIBBY, EARL WEESE and LYLA C. WEESE, Individually and as Class Representatives on Behalf of all Persons Similarly Situated,
Petitioners,

v.

STATE OF ALASKA, COMMERCIAL FISHERIES ENTRY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Alaska

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE TANGIER SOUND WATERMAN'S ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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12 pp

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-685

DONALD H. CARLSON, WARREN HART,
GERARD HASKINS, STEPHEN R. LIBBY,
EARL WEESE and LYLA C. WEESE,
Individually and as Class Representatives
on Behalf of all Persons Similarly Situated,
Petitioners,

v.

STATE OF ALASKA,
COMMERCIAL FISHERIES ENTRY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Alaska

MOTION FOR LEAVE TO FILE BRIEF OF THE TANGIER SOUND WATERMAN'S ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

The Tangier Sound Waterman's Association (the "Association") hereby respectfully requests leave to file the attached brief as *amicus curiae* in Support of the Petition for Certiorari. Counsel for respondent has refused to consent to the filing of the attached brief.

The Association is an unincorporated group of about 80 commercial fishermen who live in Maryland. Many of the Association's members have been victims of the discriminatory burdens imposed by non-resident fishing fees, such as those in this case, because they must pay a non-resident fee in order to fish in Virginia. In addition, the Association has long been concerned that states do not impede the fundamental rights of

fishermen to engage in their livelihood without discriminatory regulations. The interest of the Association as *amicus curiae* is described in greater detail *infra* at Brief, pp. 1-2.

The Association requests that this Court grant this motion for two primary reasons. First, the Association has experience with discriminatory non-resident fees such as those in this case and believes that its discussion of the issues will benefit the Court. The Association has participated in two cases involving discrimination against non-resident commercial fishermen. *See Tangier Sound Waterman's Association v. Pruitt*, 4 F.3d 264 (4th Cir. 1993); *Tangier Sound Watermen's Association v. Virginia*, 541 F. Supp. 1287 (E.D. Va. 1982).

Second, the members of the Association have a strong interest in these issues and wish to address the implications of this case for fishermen across the country. Unconstitutional non-resident fishing fees are widespread and often prohibitively high. Unfortunately, fishermen often lack the financial resources necessary to pay or challenge non-resident fees. Because of its experience in this area, the Association would like to comment on these issues for the benefit of the Court.

Wherefore, the Association respectfully requests that this Court grant its Motion for Leave to file this brief *amicus curiae*.

Respectfully submitted,

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December 12, 1996

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BRIEF OF THE TANGIER SOUND WATERMAN'S ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

INTRODUCTORY STATEMENT

This brief is submitted by the Tangier Sound Waterman's Association as *amicus curiae* in support of the Petitioners.

INTEREST OF *AMICUS CURIAE*

The Tangier Sound Waterman's Association (the "Association") is an unincorporated association of about 80 commercial fishermen residing in Maryland in communities on Smith Island and in the vicinity of Crisfield, Maryland, on the Eastern Shore of the Chesapeake Bay. Smith Island is located at approximately the center of the Chesapeake Bay and is transected at its southernmost tip by the boundary between Maryland and

Virginia. The Association's members harvest the many species of edible fish, crabs and shellfish in the waters of the Chesapeake Bay and its tributaries.

The Association has long been concerned with discrimination against non-resident commercial fishermen. Prior to 1982, Virginia prohibited all non-residents from commercial fishing within Virginia's territorial waters. In *Tangier Sound Watermen's Association v. Virginia,* 541 F. Supp. 1287 (E.D. Va. 1982) ("*Tangier I*"), the District Court for the Eastern District of Virginia held that Virginia's prohibition on all non-resident fishing was unconstitutional. In 1983, in reaction to the decision, the Virginia legislature imposed a fee of $350 upon non-residents engaging in commercial fishing within the Commonwealth of Virginia.

In 1991, Virginia tripled its non-resident commercial fishing fee to $1,150 per boat. Va. Code §§ 28.1-47.1, *as amended* (1991). The Association successfully challenged this fee as violating the Privileges and Immunities Clause of the United States Constitution. *Tangier Sound Waterman's Association v. Pruitt,* 4 F.3d 264 (4th Cir. 1993) ("*Tangier II*"). After the decision in *Tangier II*, Virginia's General Assembly passed another statute authorizing the Virginia Marine Resources Commission (the "Commission") to establish a fee "no less than $350 or more than $1,150." Va. Code § 28.2-227, *as amended* (1993). Since 1993, the Commission has charged a $350 non-resident fee. Like the prior $350 non-resident fee, the fishermen have not challenged the present fee of $350 because it is economically prohibitive for them to do so.

Many of the Association's members harvest fish in Virginia, reside in Maryland near the Virginia boundary, and thus have a particular interest in non-resident fishing fees. In addition, the Association is concerned that states do not impede, through non-resident fees, the fundamental rights of fishermen to engage in their livelihood without suffering the burden of unreasonable and discriminatory regulations. If not reviewed by this Court, the decision in this case will encourage other states to discriminate

against non-residents by enacting or increasing non-resident commercial fishing fees in disregard of the Privileges and Immunities Clause and the Commerce Clause of the United States Constitution.

STATEMENT

This case involves Privileges and Immunities Clause and Commerce Clause challenges to Alaska's non-resident commercial fishing fees. Given the tendency of States to favor their own residents over non-residents who cannot vote, parochial and discriminatory non-resident fees are a common burden and often a total barrier for commercial fishermen. Non-resident fees such as those imposed in this case are clearly unconstitutional under the Privileges and Immunities Clause and the Commerce Clause.

ARGUMENT

I. THERE ARE COMPELLING REASONS FOR GRANTING THE WRIT

The questions raised by the Petitioners in this case merit this Court's review. States have a tendency and incentive to favor their own citizenry and industry over those of other States. The desire to prevent the states from taxing each other was one of the driving forces behind the Constitution. Repeatedly in *The Federalist Papers,* the founders argued in favor of the Commerce and Privileges and Immunities Clauses to limit the "unbridled spirit [in] regulations of trade, by which particular States might endeavor to secure exclusive benefits to their own citizens" and "the desire of the commercial States to collect in any form, an indirect revenue from their uncommercial neighbors." *The Federalist Papers,* Nos. 7 and 42 (G. Wills ed. 1982) at 30 and 214.

Despite the Privileges and Immunities Clause, the Commerce Clause and the body of caselaw finding that there is no substantial reason for discriminating against non-residents trying to earn a living in the commercial fisheries, states continue to maintain discriminatory commercial fishing fees based upon state

residency. For example, despite this Court's decision in *Mullaney v. Anderson,* 342 U.S. 415 (1952), Alaska continued to levy higher fees for non-resident commercial fishermen. After the court struck down Virginia's absolute prohibition on non-resident fishermen in *Tangier I*, 541 F. Supp. 1287 (E.D. Va. 1982), Virginia immediately implemented a non-resident fee of $350. When that fee did not keep out non-residents, Virginia tripled the fee to $1,150. After the Fourth Circuit held that Virginia's $1,150 fee violated the Privileges and Immunities Clause in *Tangier II*, 4 F.3d 264 (4th Cir. 1993), Virginia authorized yet another non-resident fee. Va. Code § 28.2-227, *as amended* (1993). At least nineteen other States discriminate against commercial fishermen by imposing non-resident fees. *See* Petition for Certiorari at fn. 20.

This unconstitutional discrimination is pervasive because there are real and significant impediments to challenging non-resident fees. Commercial fishermen usually operate independently and tend to be loosely organized, if at all. Even when fishermen are organized, they often lack the financial resources necessary to mount a legal challenge against a state. Non-resident fishermen are helpless to change the laws through the political process in states where they do not reside. As a result, commercial fishermen across the country continue to pay unconstitutional fees. Given these national implications, the Petition for Certiorari should be granted.

II. THE DECISION OF THE SUPREME COURT OF ALASKA DIRECTLY CONFLICTS WITH DECISIONS OF THIS AND OTHER COURTS CONSIDERING THE ISSUE OF NON-RESIDENT COMMERCIAL FISHING FEES

In contrast to the Supreme Court of Alaska, this and other courts have consistently held that non-resident fishing fees violate

the Privileges and Immunities Clause.[1] The leading case is *Toomer v. Witsell*, 334 U.S. 385 (1948), in which this Court held that South Carolina's $2,500 fee for non-resident shrimp fishermen violated the Privileges and Immunities Clause. *Toomer v. Witsell*, 334 U.S. 385, 399 (1948). Following *Toomer*, the Court in *Steed v. Dodgen*, 85 F. Supp. 956 (W.D. Tex. 1949), enjoined the State of Texas from enforcing a non-resident license fee of $200 per person compared to a $3 fee for a resident, and a non-resident license fee of $2,500 per boat compared to $3 or $15 for a resident. The Court found that the non-resident licenses were based solely on citizenship, and that there was no substantial reason for the discrimination:

> The resident and the non-resident commercial fishermen are engaged in the same common calling, using substantially the same means and methods; and there is not shown to be any real distinction between the fishing vessels owned and used by resident commercial fishermen and those owned and used by non-resident commercial fishermen.

Steed, 85 F. Supp. at 957-958.

This Court again addressed the issue of non-resident fishing fees in *Mullaney v. Anderson*, 342 U.S. 415 (1952). In *Mullaney*, the then territory of Alaska imposed a $5 license fee on resident fishermen and a $50 fee on non-residents. This Court

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[1] Outside the area of commercial fishing, the Courts have likewise repeatedly invalidated State laws discriminating against non-residents trying to earn a livelihood. *See, e.g., Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988) (Virginia's requirement that only Virginia residents could become admitted to the State's bar without examination violates the Privileges and Immunities Clause); *Hicklin v. Orbeck*, 437 U.S. 518 (1978) (Alaskan statute requiring preferential hiring of Alaskans over non-residents violates the Privileges and Immunities Clause); *O'Reilly v. Board of Appeal for Montgomery County, Maryland*, 942 F.2d 281 (4th Cir. 1991) (Privileges and Immunities Clause invalidates County's taxi license requirements favoring drivers familiar with County).

held that Alaska's discriminatory fees violated the Privileges and Immunities Clause. Other cases striking down non-resident commercial fishing fees are *Tangier II*, 4 F.3d 264 (4th Cir. 1993) (Virginia's $1,150 non-resident fee violated Privileges and Immunities Clause), and *Gospodonovich v. Clements*, 108 F. Supp. 234 (E.D. La. 1951) (non-resident fishing fees held invalid under Privileges and Immunities Clause).[2]

Non-resident commercial fishing fees violate the Commerce Clause as well as the Privileges and Immunities Clause. Contrary to the holding of the Supreme Court of Alaska in this case, there can be no doubt that commercial fishing is an aspect of interstate commerce. *See Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 281-282, n. 16-18 (1977). The only purpose served by these non-resident fees is economic protectionism designed to favor the residents of the home state over other United States citizens. Otherwise states would adopt evenhanded restrictions and fees that would apply equally to residents and non-residents. Such protectionist barriers to interstate commerce are plainly beyond the scope of permissible state regulation under the Commerce Clause. *See City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Oregon*, 114 S.Ct. 1345 (1994).

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[2] The Courts have also invalidated state laws restricting commercial fishing grounds based upon state residency. *See Brown v. Anderson*, 202 F. Supp. 96 (D. Alas. 1962) (Alaska may not close commercial fishing areas to non-residents); *Tangier I*, 541 F. Supp. 1287 (E.D. Va. 1982) (prohibition against non-resident commercial fishermen violates Privileges and Immunities Clause).

CONCLUSION

For the reasons set forth above, the Tangier Sound Waterman's Association respectfully requests that the Court grant a writ of certiorari and reverse the decision of the Supreme Court of Alaska.

Respectfully submitted,

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December 12, 1996

Supreme Court, U.S.
FILED
DEC 23 1996
CLERK

No. 96 - 685

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

DONALD H. CARLSON, WARREN HART, GERARD HASKINS, STEPHEN R. LIBBY, EARL WEESE, and LYLA C. WEESE, INDIVIDUALLY and as CLASS REPRESENTATIVES ON BEHALF OF ALL PERSONS SIMILARLY SITUATED,

Petitioners,

v.

STATE OF ALASKA, COMMERCIAL FISHERIES ENTRY COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Alaska

REPLY FOR PETITIONERS

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REPLY FOR PETITIONERS

Respondent's Brief in Opposition confirms that certiorari should be granted.

1. Respondent does not dispute that the issues in this case are important. Nor does Respondent dispute that the issues before this Court are recurring, as highlighted by the amicus brief filed by the Tangier Sound Waterman's Association. Respondent is also unable to reconcile the decision below with this Court's decision in *Mullaney v. Anderson*, 342 U.S. 415 (1952), invalidating a virtually identical statute enacted by the Alaska Territorial Legislature.

2. Nor can Respondent reconcile the decision below with other decisions of this Court. Respondent does not even attempt to defend the Alaska Supreme Court's theory that, because fishing is a local activity, the Commerce Clause is not violated by Alaska's discriminatory fishing license and permit scheme. *See* Pet. 16-19.[1] Nonetheless, Respondent defends the Alaska Court's decision upholding the discrimination under the Commerce Clause. Respondent argues that the court below was correct in holding that residency discrimination does not implicate the Commerce Clause and should be tested only under the Privileges and Immunities Clause. Opp. 5.

Respondent concedes that this Court has never held that discrimination based on residency is permissible under the Commerce Clause. Opp. 5. As shown in the Petition (Pet. 13-16), the decision below conflicts with decisions of this Court holding discrimination based on residency to be unconstitutional. Although Respondent remarkably concedes that the cases we cited in the Petition "seem to support [Petitioners'] proposition," Opp. 6, Respondent nonetheless argues that they are distinguishable on

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[1] Respondent erroneously suggests that the court below did not theorize that fishing, as a "local activity," does not fall within the Commerce Clause. Opp. 8-9. While respondent is correct that the Alaska Supreme Court discussed such "local activity" in *Carlson I*, Pet. App. 47a-48a n.4, it also figured in the court's decision in *Carlson II*. *See* Pet App. 6a n.8.

their facts because in each case the discrimination was predicated on the movement of articles across state lines, not on residency. Opp. 7. But discrimination based on residency is impermissible whether or not movement across state lines is involved. In any event, as this Court has recognized, the movement of the non-resident fishermen into Alaska from out-of-state constitutes commerce: "[I]t is settled beyond question that the transportation of persons is 'commerce' within the meaning" of the Commerce Clause. *Edwards v. California*, 314 U.S. 160, 172 (1941). In addition, the movement of the harvested fish across state boundaries also constitutes interstate commerce. *See, e.g., Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 282 (1977).

Significantly, this Court long ago held that the Commerce Clause directly and explicitly reaches and prohibits discrimination based on residency status. *Edwards v. California*, 314 U.S. at 174. At issue in *Edwards v. California* was a California statute that barred "bringing into the State any indigent person who is not a resident of the State . . . ." 314 U.S. at 171 (quoting statute). This Court declared that "[i]t is difficult to conceive of a statute more squarely in conflict" with the core purposes of the Commerce Clause. *Id.* at 173; *see American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266, 282 (1987) ("the Commerce Clause prohibits a State from imposing a heavier tax burden on out-of-state businesses that compete in an interstate market than it imposes on its own residents who also engage in commerce among states"). The Alaska Supreme Court's decision declining to test the discrimination under the Commerce Clause plainly warrants this Court's review.

3. The Privileges and Immunities Clause holding of the Alaska Supreme Court also warrants review. Respondent does not dispute that it is in direct conflict with this Court's decision in *Mullaney v. Anderson*, 342 U.S. 415. Nonetheless, Respondent attempts to defend the holding of the court below, that discriminatory taxes can be justified under the Privileges and Immunities Clause by taking into account revenues foregone by residents and used to fund fishing management expenses. Respondent does not dispute that such general revenues could not

be used to justify discrimination under the Commerce Clause. *See, e.g., Fulton Corp. v. Faulkner*, 116 S.Ct. 848, 856 (1996); *Oregon Waste Systems v. Dep't of Environmental Quality*, 511 U.S. 93, 105 n.8 (1994).

Respondent can point to no meaningful distinction in principle between the Commerce Clause and the Privileges and Immunities Clause that should lead to a different result under the Privileges and Immunities Clause. As this Court has recognized, "permitting discriminatory taxes on interstate commerce to compensate for charges purportedly included in general forms of intrastate taxation would allow a state to tax interstate commerce more heavily than in-state commerce anytime the entities involved in interstate commerce happened to use facilities supported by general state tax funds." *Fulton Corp.*, 116 S.Ct. at 856. (quotation omitted).

Respondent also can point to no cases under the Privileges and Immunities Clause that have held that general tax contributions, much less foregone revenues, can justify discriminatory taxes on non-residents.[2] Thus, this Court should grant certiorari to resolve this important question.[3]

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[2] Respondent claims (Opp. 9) that dicta in *Toomer v. Witsell*, 334 U.S. 385 (1948), that a "State is not without power . . . to charge non-residents a differential which would merely compensate the State for any . . . conservation expenditures from taxes which only residents pay," *id.* at 398-99, establishes a "tax attribution doctrine" which permits states to justify discrimination against non-residents by reference to general tax revenues. But Petitioners concede that this Court has never upheld discrimination against non-residents on that basis. Opp. 11. Moreover, as we demonstrated in the Petition, the analogous doctrine has been rejected under the Commerce Clause. Pet. 21-23.

[3] While the license and permit fees at issue here are not user fees, *see Clark v. Paul Gray, Inc.*, 306 U.S. 583, 599 (1939) (user fees are assessed "to reimburse the State for costs incurred in" providing specific, quantifiable services); *Commonwealth Edison v. Montana*, 453 U.S. 609, 621-22 (1981) (user fees apply to state-owned properties such

4. Although Respondent attempts to minimize the importance of the discriminatory fees, the importance of this issue in Alaska is well established.[4] Fishing is the second largest industry in Alaska. Pet. 2. As described in the Petition, commercial landings of fish in 1995 were valued at $1.4 billion, and generated over $77 million in taxes and fees to the State in 1994. Pet. 2-3 & nn. 2-4. Moreover, this case presents an important opportunity for this Court to address this discrimination, which is as widespread as it is unlawful. *See* Pet. 25-26 n.20. As the Tangier Waterman's Association pointed out in its *amicus* brief, the nature of the fishing industry, with commercial fishermen "loosely organized, if at all" and "often lack[ing] the financial resources necessary to mount a legal challenge against a state," Amicus Br. at 4, means that unconstitutional fees remain in place, even though their unconstitutionality was established more than forty years ago in this Court's decision in *Mullaney v. Anderson*.

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as airports, roads and transportation), it would not make any difference whether, as Respondent suggests, Opp. 15, the discriminatory tax is considered a "user fee" rather than a tax. Although this Court has said that user fees may be subject to a somewhat different analysis than taxes under some circumstances, *see Interstate Transit, Inc. v. Lindsey*, 283 U.S. 183, 190 (1931), it has at the same time made clear that, like taxes, user fees are constitutionally permissible only if they do not discriminate against interstate commerce. *See, e.g., Oregon Waste Systems*, 511 U.S. at 103-04 n.6 ("even if the [Oregon] surcharge could somehow be viewed as a user fee, it could not be sustained given that it discriminates against interstate commerce"); *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 356, 368 (1994) (user fee is valid only to the extent it "does not discriminate against interstate commerce"); *Evansville-Vanderburgh Airport Authority v. Delta Airlines, Inc.*, 405 U.S. 707, 717 (1972) (cited in Opp. 15 n.8) (upholding the facially neutral one dollar airline boarding fee "because both interstate and intrastate flights are subject to the same charges").

[4] Although Respondent attempts to distance itself from its own Annual Report (Opp. 1 n.2), that Report recognized that the overall permitting structure is designed to favor residents over non-residents. *See* Pet. 5.

If the states believe that this Court's decisions in state taxation can be ignored, the protections offered by the Commerce Clause and the Privileges and Immunities Clause will be meaningless. Review in this case is thus particularly important.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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